95-644 (2)

Supreme Court, U.S.
FILED
OCT 19 1995
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

MCKESSON CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX FOR PETITIONER

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Dated: October 19, 1995

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 27, 1995 Decided April 14, 1995

Nos. 93-7167 & 93-7168

McKesson Corporation; Foremost Tehran, Inc.;
Foremost Shir, Inc.; Foremost Iran Corporation;
Overseas Private Investment Corporation,
Appellees/Cross-Appellants

v.

Islamic Republic of Iran,
Appellant/Cross-Appellee

Appeal from the United States District Court
for the District of Columbia Circuit
(82cv00220)

Thomas G. Corcoran, Jr. argued the cause for appellant/cross-appellee. With him on the briefs was *Henry M. Lloyd.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Mark R. Joelson and *Mark N. Bravin* argued the cause and filed the briefs for appellees/cross-appellants. *Joseph P. Griffin* entered an appearance.

Before: HENDERSON, RANDOLPH, and ROGERS, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge:* These are interlocutory cross-appeals from the judgments of the district court rendered on remand from our decision in *Foremost–McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990). Iran's appeal presents two issues regarding its immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94–583, 90 Stat. 2891 (1976) (codified in part at 28 U.S.C. §§ 1330, 1391(f), 1602–1611). The first is whether, as the district court ruled on remand and as we determined in Iran's 1990 interlocutory appeal, the complaint alleges a sufficient "direct effect in the United States" to deprive Iran of immunity under FSIA § 1605(a)(2). We hold that the law of the case applies and therefore refuse to reconsider our earlier decision. Iran's second issue is whether, as the district court found, the evidence establishes a principal-agent relationship between Iran and its codefendants with respect to the alleged interference with and taking of McKesson's shareholder rights in a dairy company in Iran. On this subject, we sustain the district court's finding. McKesson and the Overseas Private Investment Corporation (OPIC) appeal from the district court's judgment refusing to impose certain sanctions on Iran for its failure to comply with discovery requests. Because the court's judgment is not a final order, it is not subject to interlocutory review. We therefore dismiss McKesson's and OPIC's appeal for lack of appellate jurisdiction.

I

A

McKesson Corporation is a Maryland corporation with its principal place of business in California. In 1959, at the

request of a group of Iranian citizens, McKesson agreed to assist in establishing a dairy, the Sherkat Sahami Labaniat Pasteurize Pak ("Pak Dairy") in Iran. McKesson's amended complaint alleges that it agreed to furnish "one-half of the required capital, and all the necessary management skills and personnel, engineering data, sources of material, procurement services, ingredients, and packaging. Through separate agreements, McKesson agreed to provide technical assistance as needed, and licensed its trademarks in exchange for receipt of royalties." Between 1959 and 1979, McKesson provided the top management for the dairy, and controlled its board of directors. In 1979, McKesson—or Foremost-McKesson, Inc., as the company was then called—held 31 percent of the equity interest in Pak Dairy.

The following text and footnotes 1–6 describing what then transpired are taken from our earlier opinion. "On January 22, 1982, [McKesson] and the Overseas Private Investment Corporation[1] filed a complaint in the District Court against Iran and several agencies and instrumentalities of Iran through which [McKesson] claims Iran acted. These agencies and instrumentalities included the Financial Organization for the Expansion of Ownership of Productive Units, the National Investment Company of Iran, [Bank of Industry and Mine], the Foundation for the Oppressed and Pak Dairy. The complaint alleged that Iran, acting through the codefendant agencies and instrumentalities, illegally divested [McKesson] of its investment in Pak Dairy. [McKesson] and OPIC sought compensation for the entire value of their jointly held 19.84% insured equity interest in Pak Dairy,[2] allegedly valued at not less than $7,040,000, plus interest; compensation for their share in any dividends declared and not received before the alleged divestment of their equity interest; and various

[1] OPIC is an agency of the United States that insures private overseas investments of United States nationals.

[2] [McKesson] sought damages only for the insured portion of its shareholding: 64% of its 31% ownership or 19.84% of the total shares.

other damages, including attorneys' fees. *See* Complaint ¶¶ 38–39, *reprinted in* Appendix ('App.') 36.

"On June 29, 1982, Iran responded to the complaint in what it titled an 'Answer to Complaint.' *See* Answer to Complaint [hereinafter 1982 Answer], *reprinted in* App. 46. In this response, Iran did not state the defenses raised in its motion to dismiss and did not admit or deny [McKesson]'s averments, *cf.* Fed. R. Civ. P. 8(b); rather, Iran contended that prosecution of the suit was barred by the so-called Algiers Accords of January 19, 1981,[3] and that, pursuant to Executive Order No. 12,294, 46 Fed. Reg. 14,111 (1981) ('Executive Order'), the 'complaint ha[d] no legal effect other than to toll the applicable statute of limitations.' 1982 Answer at 1, *reprinted in* App. 46.[4] Pursuant to the terms of the Executive Order, the District Court took no action in this case while [McKesson] and OPIC presented their claims against Iran to the Iran–United States Claims Tribunal ('Claims Tribunal') in The Hague.

"On April 10, 1986, the Claims Tribunal concluded that interference with [McKesson]'s rights had not, by January 19, 1981, amounted to an expropriation. *See Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 Iran–United States Claims Trib. Rep. 228, 250, *reprinted in* App. 78.[5] However,

---

[3] Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 Int'l L. Materials 224 (1981) [hereinafter Algiers Accords].

[4] The Executive Order provided that plaintiffs with claims arguably within the jurisdiction of the Claims Tribunal could file suit in federal court in order to toll the period of limitations for commencing the action. *See* 46 Fed. Reg. at 14,111. The Executive Order "purports only to 'suspend' the claims, not divest the federal court of 'jurisdiction.'" *Dames & Moore v. Regan*, 453 U.S. 654, 684 (1981).

[5] A claim must have been "outstanding" on January 19, 1981, to fall within the jurisdiction of the Claims Tribunal. *See* Algiers Accords, *supra* note 3, at art. II, ¶ 1; *see also Foremost Tehran, Inc. v. Iran*, 10 Iran–United States Trib. Rep. at 233 n.5, *reprinted in* App. 54 n.2. The parties apparently dispute whether the Claims

the Claims Tribunal concluded that Pak Dairy had unlawfully withheld from [McKesson] cash dividends declared in 1979 and 1980, and it therefore awarded [McKesson] approximately $900,000, plus interest, against Iran. The Claims Tribunal also concluded that Pak Dairy unlawfully failed to deliver to [McKesson] stock certificates representing stock dividends declared in 1980 and that Pak Dairy had breached contractual obligations in failing to pay rental payments due and to return upon demand certain machines to [McKesson]. The Claims Tribunal awarded [McKesson] in excess of $500,000 in damages against Pak Dairy for the contract breaches. *See id.* at 257–58, *reprinted in* App. 88. Iran paid the amounts awarded out of the security account established at The Hague pursuant to the provisions of the Algiers Accords.

"On April 1, 1988, the plaintiffs—still seeking damages for claimed losses—revived this lawsuit by filing a motion for partial summary judgment against Iran on the issue of liability. The plaintiffs alleged facts that arguably support a conclusion that the dairy was expropriated *after* the 1981 limit to the Claims Tribunal's jurisdiction. *See Foremost–McKesson, Inc. v. Islamic Republic of Iran*, Civ. Action No. 82–0220, slip op. at 2 (D.D.C. Apr. 18, 1989) ('*Foremost III*'), *reprinted in* App. 4.[6]

* * *

"Concurrently, Iran filed a motion to dismiss the underlying complaint, pursuant to Rule 12(b)(1) and (2) of the Federal Rules of Civil Procedure, for lack of jurisdiction under FSIA. The District Court denied Iran's motion to dismiss. *See Foremost III*, Civ. Action No. 82–0220 (D.D.C. Apr. 18, 1989), *reprinted in* App. 3. Iran then filed this interlocutory

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Tribunal's determination in favor of Iran on the expropriation claim was based on the merits or on lack of jurisdiction. However, that issue is not before us in this appeal, and accordingly, we do not address that issue.

[6] The Supreme Court explained in *Dames & Moore*, 453 U.S. at 684–85, that, "[a]s we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will 'revive' and become judicially enforceable in United States courts."

appeal." *Foremost–McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d at 441–42.

B

A foreign state is "immune from the jurisdiction of the courts of the United States and of the States" unless the foreign state's conduct falls within one of FSIA's exceptions. 28 U.S.C. §§ 1604, 1605–07; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). In our earlier ruling, we affirmed the district court's judgment that "the facts alleged by [McKesson] exhibit sufficiently direct effects to confer subject matter jurisdiction under the third clause of section 1605(a)(2)." 905 F.2d at 450.[7] McKesson had invoked the "commercial activity" exception contained in the third clause of § 1605(a)(2), which reads:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> * * *
>
> (2) in which the action is based ... upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

After we remanded the case, the Supreme Court issued *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160 (1992), interpreting § 1605(a)(2)'s commercial activity exception. Claiming that *Weltover* had undermined our ruling, Iran once again moved to dismiss the suit. The district court responded thus: "As McKesson suggests and the Court of Appeals has affirmed, the [district] Court's finding of a direct effect in the United States is fully supported by the evidence, regardless of any changes engendered by *Weltover*."

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[7] We also held that McKesson had satisfied the portion of § 1605(a)(2) requiring that its suit be based upon "an act" in Iran "in connection with a commercial activity" of Iran. 905 F.2d at 449–50. This holding is not involved in the present appeal.

In our earlier decision, we also determined that the district court, in making its initial jurisdictional determination, had to make factual findings regarding the "degree of control exerted by Iran over Pak Dairy and over the shareholder entities that [McKesson] alleges are government controlled." 905 F.2d at 453. Unless "the relationship between Pak Dairy and Iran is one of principal to an agent," the actions of the codefendant entities could not be attributed to Iran, and § 1605(a)(2) would not deprive Iran of immunity from suit.

On remand from our earlier decision, the district court denied McKesson's motion to sanction Iran for failing to provide discovery. Although Iran's responses to the interrogatories and document requests "skirted close to the edge," Iran had not violated the court's discovery order or the Federal Rules of Civil Procedure. The district court therefore never passed on McKesson's claim that an appropriate sanction would be a finding of subject matter jurisdiction.

II

In order for us to rule for the second time on Iran's contentions regarding the direct effects portion of § 1605(a)(2), we would have to find some reason for not adhering to the law of the case doctrine. "When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *Crocker v. Piedmont Aviation, Inc.*, No. 93–7141, slip op. at 5 (D.C. Cir. Mar. 3, 1995). One common reason for lifting this constraint is an intervening Supreme Court decision changing the law. *NTEU v. FLRA*, 30 F.3d 1510, 1516 (D.C. Cir. 1994). Iran supposes that *Weltover* fits that mold.

Before *Weltover*, several courts, including this one, subscribed to the view that under § 1605(a)(2), direct effects must also be "substantial" and "foreseeable." The quoted terms appeared, not in the statute, but in a House Report on the bill that became the FSIA. Agreeing with a line of Second Circuit decisions, including *Texas Trading & Milling*

Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 311 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), the Supreme Court in *Weltover* rejected "the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" 112 S. Ct. at 2168. Even insubstantial effects qualify under § 1605(a)(2) so long as they are not "purely trivial." *Id.* Whether effects were foreseeable is beside the point. It is enough, the Court held, that the consequences of the defendant's activities followed immediately from those activities. *Id.* The effects then are "direct." The Court also decided that the effects in *Weltover* were "in the United States," as § 1605(a)(2) also required. Plaintiffs had satisfied this aspect of § 1605(a)(2) although they were foreign corporations holding Argentine bonds: the bonds were payable in the United States and Argentina's failure to honor this contractual commitment "necessarily had a 'direct effect' in the United States." *Id.*

There is no doubt that, as far as this circuit is concerned, *Weltover* changed the law. The question remains whether *Weltover* did so in a way that was material to the outcome of our previous ruling in this case. The significance of *Weltover* stemmed not from the Supreme Court's unremarkable equation of "direct" and "immediate," but from the Court's rejection of the additional requirements of foreseeability and substantiality this court and others, not including the Second Circuit, had engrafted on § 1605(a)(2)'s commercial activity exception. If our earlier decision in this case had been that the effects McKesson alleged were "direct" *because* they were foreseeable and substantial, *Weltover* would warrant reconsideration of our ruling. But that is not what we held in the first appeal. Our decision was that the following effects of Iran's alleged actions were "foreseeable, substantial *and* direct." 905 F.2d at 451 (italics added): the "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran to support the operation of Pak Dairy" came to a halt; and McKesson's role as an active investor ceased when the dairy's new directors, illegally installed according to McKesson, cut off all of the dairy's existing "commercial ties"

with McKesson in the United States. *Id.*[8] *Weltover* rendered superfluous our discussion of why these effects were "foreseeable" and "substantial." But *Weltover* did not undermine our separate determination that these alleged effects were also "direct." In reaching that conclusion we relied on, and said we were "[a]dhering" to, the Second Circuit's decision in *Texas Trading*, the same case the Supreme Court cited with approval in *Weltover*. 905 F.2d at 451.[9] Nothing in our prior opinion indicates that we believed "direct" meant anything other than immediate. In addition to *Texas Trading*, we relied upon *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988), which held that the effect in the United States of a breach of contract abroad could not be "direct" under § 1605(a)(2) if the "effect is due to an intervening event." As the Tenth Circuit has recognized, *Zedan* is consistent with *Weltover*. *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1239 & n.6 (10th Cir. 1994).

While *Weltover* changed the law by removing foreseeability and substantiality from consideration, it did not undercut the remaining reason we gave for applying the commercial activity exception of § 1605(a)(2)—that the effects were "direct." Because this portion of our prior opinion is unaffected by *Weltover*, it remains the law of the case, not subject to

---

[8] These were the "effects" the court determined were foreseeable, substantial and direct. McKesson's theory was not that Iran's calling a halt to the flow of capital, equipment and personnel breached any legal obligations, but that the stoppage was a direct consequence of Iran's interference with McKesson's "rights to participate in the management of Pak Dairy" (*see, e.g.*, Amended Complaint ¶¶ 24, 26–30, 33–36).

[9] Relying on *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1146–47 (D.C. Cir. 1994), Iran claims that Pak Dairy's cash dividends were payable in Iran, not in the United States, and for that reason McKesson's failure to receive these dividends cannot be considered a § 1605(a)(2) "direct effect in the United States." But our earlier decision is controlling and it did not mention, as a direct effect, Pak Dairy's failure to pay cash dividends to McKesson. *See* 905 F.2d at 450–51.

reconsideration in this second interlocutory appeal. What we wrote five years ago bears repeating: "We are not making a final determination whether jurisdiction exists under FSIA; nor are we making any final factual determinations. Rather we are addressing whether the District Court properly denied Iran's motion to dismiss." 905 F.2d at 440 n.3. As before, we "find no infirmity with the District Court's determination that the alleged effects were sufficiently direct to survive Iran's motion to dismiss." *Id.* at 451.

III

In the previous section we assumed that the alleged actions having a direct effect in the United States were attributable to Iran. Whether that assumption is correct is the second issue posed in Iran's appeal. We said in our earlier ruling that in order to deprive Iran of immunity, the district court had to find that Iran exercised "sufficient control ... over Pak Dairy to create a relationship of principal to agent." 905 F.2d at 447. While the FSIA applies both to instrumentalities and agencies of the foreign sovereign, and to the sovereign itself, there is a presumption that such entities and the sovereign are independent. *Id.* at 446, citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626–27 (1983) ("*Bancec*"). "Iran's alleged control over Pak Dairy was exercised through entities on Pak Dairy's Board, which were in turn controlled by Iran. Thus, the alleged principal/agent relationship is not a direct one and, hence, the showing required to support a claim of attribution is far from straightforward." 905 F.2d at 448.

It would serve no useful purpose to recite in detail the extensive findings the district court issued on remand. We have reviewed those findings and have determined that they are well-supported. The Financial Organization for the Expansion of Ownership of Productive Units, the National Investment Company of Iran, the Bank of Industry and Mine, and the Foundation for the Oppressed were, the court found, organizations of the Iranian government. Together these government entities held 52 percent of Pak Dairy's stock and

controlled six of the seven seats on its board of directors. Pak Dairy's board and its government shareholders forced the dairy to disregard its commercial mission and its duties to McKesson as a shareholder. In the words of the Financial Organization's Managing Director, who dominated and eventually chaired the board, Pak Dairy was no longer "a joint stock company" whose primary fiduciary duty was to its stockholders. Rather, "the profit of the people and the Government should also be considered" and "the main objective is . . . to protect the interests of the country. . . ." Iran's interest became the decisive factor in Pak Dairy's actions with regard to McKesson. Routine business decisions, such as declaring and paying dividends to shareholders and honoring the dairy's contractual commitments, were dictated by Iran through the Financial Organization and the other government representatives on Pak Dairy's board. In regard to Pak Dairy's denying dividends to McKesson, Iran's role was direct and manifest. The board deferred its decision to withhold dividends from McKesson so that "the representatives of the government firms would get in touch with their heads to find a probable solution to the problem." Hence Iran's Cabinet Ministers (and officials answerable to them) became involved in this decision-making process, as reflected by Pak Dairy's corporate records.

From this and other evidence, the district court properly found that:

> Upon recommendations by the board, the shareholders, a majority of which were government-owned, determined when to pay cash and stock dividends. The board decided that Pak Dairy would not pay any money to foreign shareholders, including McKesson. This extensive involvement in the day-to-day operations of Pak Dairy is evidence of a principal/agent relationship between Iran and Pak Dairy.

Iran argues that "*the principal* . . . must manifest in some manner that the agent is its agent." Brief for Appellant at 30. Here, as the district court found, Iran did manifest its agency relationship with the co-defendants. That relation-

ship was manifested generally through Iran's control over the management of the co-defendants and through a pattern of conduct and policy statements that caused "the agent[s] to believe that the principal desire[d] [them] so to act on the principal's account." RESTATEMENT (SECOND) OF AGENCY § 26 (1957). That conduct, as the district court described it, included rampant anti-American propaganda, expulsions of Americans and takings of American interests, which caused the government representatives on Pak Dairy's board to believe that Iran desired them to take these steps with regard to McKesson. And Iran's manifestation of assent to the denial of dividends to McKesson came from the highest levels of the Iranian government when the Pak Dairy board members sought approval from their agency heads before acting.

There is, in short, more than enough evidence to support the district court's finding that Iran had sufficient control over Pak Dairy to create a principal/agent relationship. We also conclude that the district court applied the correct legal standard in evaluating that evidence. The Supreme Court's *Bancec* decision, on which our earlier opinion relied, invokes attribution principles common to both international law and federal common law. 462 U.S. at 621–23. We have already mentioned the Restatement of Agency. In the international context, jurists and scholars recognize that when a state-controlled corporation implements state policies, its separate corporate existence does not shield the state from liability. *See, e.g., Case Concerning the Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 4, 38–39 (February 5); Roberto Ago, *Third Report on State Responsibility*, [1971] 2 Y.B. INT'L L. COMM'N 199, 256, UN Doc. A/CN.4/246 and Add.1–3 (1971) (when the occasion arises, "the conduct of officials of [state] corporations or institutions must be regarded, at the international level, as 'acts of the State.' "); Aris Haigian, Note, *The Separate Entity Fiction Exposed: Disregarding Self-Serving Recitals of Juridical Autonomy in Nationalization Cases*, 6 FORDHAM INT'L L.J. 288, 303 (1982–83). Still, Iran may be correct that if a government corporation is simply carrying out a state commercial policy as a

normal part of the corporation's mission, without any state involvement, the state should be insulated from the corporation's actions. Many of the cases Iran cites fall into this category. This case is far different. Here the governmental policy was not commercial. It was instead designed to injure some of the corporation's own shareholders and to do so through a corporate policy guided by government representatives.

The district court offered other grounds for finding that the requisite principal-agency relationship existed and for attributing Pak Dairy's actions to Iran, but we need not pass upon those portions of its comprehensive decision. What we have already recited is sufficient to support the court's ruling on remand that the FSIA does not immunize Iran from a trial in this case.

IV

This brings us to McKesson's cross-appeal from the district court's order rejecting McKesson's motion for sanctions against Iran pursuant to Fed. R. Civ. P. 37(b)(2)(A). Although Iran had not been cooperative in responding to McKesson's interrogatories and document requests, the court did not believe Iran had violated its discovery order or the Federal Rules of Civil Procedure. Having found no violations, the court did not reach the question what sanctions would be appropriate.[10]

Orders refusing to find discovery violations, like other discovery orders, are interlocutory. They do not finally end the litigation. They are generally reviewable after final decision. If the final decision is favorable to the movant, they may never become the subject of an appeal. For these reasons and others, discovery orders are not usually appealable until the litigation has finally ended. *See, e.g., Reise v.*

[10] McKesson suggested that the court sanction Iran by finding that the "Government of Iran exercised the necessary degree of control over the other defendants to create a principal/agent relationship with respect to the matters alleged in the Amended Complaint."

Board of Regents, 957 F.2d 293, 295 (7th Cir. 1992); *Uehlein v. Jackson Nat'l Life Ins. Co.*, 794 F.2d 300, 302 (7th Cir. 1986); *Atlantic Richfield Co. v. United States Dep't of Energy*, 769 F.2d 771, 780 n.62 (D.C. Cir. 1984).

The parties argue about the merits of the court's discovery order without pausing to tell us why we have appellate jurisdiction over it. They must be assuming that our jurisdiction over Iran's interlocutory appeal from the court's denial of its motion to dismiss gives us jurisdiction over McKesson's cross-appeal. This does not follow. The district court's order denying Iran's motion to dismiss falls within the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545–47 (1949), because Iran's sovereign immunity is an immunity from trial. 905 F.2d at 443. The discovery order does not qualify for such treatment. It is not independently appealable. A "rule loosely allowing pendent appellate jurisdiction," the Supreme Court warned, "would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets," *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203, 1211 (1995). As in *Swint*, the district court's discovery order is not "inextricably intertwined" with the court's denial of Iran's motion to dismiss. *Id.* at 1212. The district court found that the case fell within § 1605(a)(2) without considering whether Iran had breached its discovery obligations. We have affirmed that interlocutory ruling. The sanction McKesson sought is therefore beside the point at this preliminary stage of the litigation. If the district court ultimately rules against McKesson on the jurisdictional issues, or if McKesson loses on the merits, it can raise the discovery issues in an appeal from the final judgment. We therefore hold that we do not have pendent appellate jurisdiction over the discovery order.

* * *

The judgment of the district court denying Iran's motion to dismiss is affirmed. McKesson's cross-appeal is dismissed for lack of appellate jurisdiction.

So ordered.

UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT
OF COLUMBIA CIRCUIT
FILED JUN 01 1995

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1994

No. 93-7167
USDC CV 82-00220

Foremost McKesson, Inc., et al.,

Appellees

v.

Islamic Republic of Iran, et al.,

Appellant

---

and Consolidated Case No. 93-7168

BEFORE: Henderson, Randolph and Rogers, Circuit Judges

ORDER

Upon consideration of appellant's motion for clarification, the response thereto, the reply, and of appellant's motion for extension of time, it is

ORDERED, by the Court, that the motion for clarification is denied. It is

FURTHER ORDERED, by the Court, that the time within which a petition for rehearing may be filed is extended for a period of thirty days from the date of this order.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/Robert A. Bonner
Robert A Bonner
Deputy Clerk

UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT
OF COLUMBIA CIRCUIT
FILED JUL 25 1995

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1994

No. 93-7167

McKesson Corporation, et al.,

Appellees,

v.

Islamic Republic of Iran,

Appellant

---

and Consolidated Case No. 93-7168

BEFORE: Henderson, Randolph and Rogers,
Circuit Judges

ORDER

Upon consideration of appellant's Petition for rehearing filed June 30, 1995, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/Robert A. Bonner
Robert A Bonner
Deputy Clerk

UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT
OF COLUMBIA CIRCUIT
FILED JUL 25 1996

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1994

No. 93-7167

McKesson Corporation, et al.,

Appellees,

v.

Islamic Republic of Iran,

Appellant

---

and Consolidated Case No. 93-7168

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing *In Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court, *in banc,* that the suggestion is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/Robert A. Bonner
Robert A Bonner
Deputy Clerk

Circuit Judge Wald did not Participate in this matter

APPENDIX D

MANDATE
Pursuant to the provisions of
Fed. R. App. Pro 41(a)
4/15/96
By: E.Bowen, Deputy Clerk
UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT
OF COLUMBIA CIRCUIT
FILED APR 14 1996

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1994

No. 93-7167
USDC CV 82-0220

McKeson Corporation, Foremost Tehran, Inc.;
Foremost Shir, Inc; Foremost Iran Corporation;
Overseas Private Investment Corporation,
Appellees/Cross-Appellants,

v.

Islamic Republic of Iran,
Appellant/Cross-Appellee

---

and Consolidated Case No. 93-7168

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEFORE: **Henderson, Randolph and Rogers,**
Circuit Judges

J U D G M E N T

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED,** by the Court, that the appeals are dismissed, in accordance with the opinion for the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/Robert A. Bonner
Robert A Bonner
Deputy Clerk

Dated: April 14, 1995
Opinion for the Court filed by Circuit Judge Randolph.

APPENDIX E

FILED
AUG 23 1990
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0220 (TAF)

McKESSON CORPORATION, *et al.*,

Plaintiffs,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Defendants.

MEMORANDUM OPINION

This matter comes before the Court on plaintiffs' motion for sanctions under Fed.R.Civ.P. 37 and for appropriate findings. This matter is also before the Court on remand from *Foremost-McKesson v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990). In *Foremost-McKesson*, the Court of Appeals remanded this Court's denial of Iran's motion to dismiss for lack of subject matter jurisdiction. For the reasons discussed below, the Court denies plaintiffs' motion for sanctions and Iran's motion to dismiss. The evidence establishes that this Court has subject matter jurisdiction over Iran.

I. Background

As the Court of Appeals noted, this case has had an "unusually complicated" procedural history. *Foremost-McKesson*, 905 F.2d at 440. Although detailed in the Court of Appeals' opinion, it is useful to repeat some of that history here. Foremost-McKesson ("McKesson") is suing Iran and

several agencies and instrumentalities through which it claims Iran acted for losses connected with McKesson's partial ownership interest in Sherkat Sahami Labiniat Pasteurize Pak ("Pak Dairy"). These agencies and instrumentalities include (1) the Foundation for the Oppressed ("the Foundation"); (2) the Financial Organization for the Expansion of Ownership of Industrial Units ("the Financial Organization"); (3) the National Investment Company of Iran ("NICI"); (4) the Industries and Mines Bank ("IMB"); and (5) Pak Dairy.

McKesson and the Overseas Private Investment Corporation ("OPIC") brought the action in 1982. The action was stayed while plaintiffs presented their claims to the Iran-United States Claims Tribunal ("the tribunal"), which ruled in 1986 that interference with McKesson's rights had not, by January 19, 1981, the last date of the Tribunal's jurisdiction, amounted to an expropriation. *See Foremost Tehran, Inc. v. Islamic Republic of Iran,* 10 Iran-U.S. Cl. Trib. Rep. 228, 250. The Tribunal ruled, however, that Pak Dairy had unlawfully withheld from McKesson cash dividends declared in 1979 and 1980. Finding that Pak Dairy was a corporation controlled by the Government of Iran, the Tribunal awarded damages, plus interest, against Iran. The Tribunal also concluded that Pak Dairy had unlawfully failed to deliver stock certificates representing stock dividends in 1980 to McKesson and had breached several contractual obligations. The Tribunal awarded damages to McKesson and Iran paid the amounts awarded out of the security account established at The Hague pursuant to the provisions of the Algiers Accords. *Foremost-McKesson,* 905 F.2 at 442.

Still seeking damages for claimed losses, in April 1988, McKesson filed a motion for partial summary judgment in this Court, thereby reviving the suit. McKesson sought partial summary judgment against Iran on the issue of liability. Iran filed a motion to strike its 1982 answer and a motion to stay

proceedings. Subsequent to the denial of these motions, Iran filed motions to amend its answer and to dismiss for lack of jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). The Court allowed Iran to amend its answer, but denied Iran's motion to dismiss. Upon an interlocutory appeal, the Court of Appeals affirmed in part and remanded in part. *See Foremost-McKesson*, 905 F.2d 438. The sole issue on remand is "whether the government of Iran exercised the necessary degree of control over the other defendants to create a principal/agent relationship and thus permit the court to deem Iran responsible for their actions." *Id.* at 445. The Court remanded the case for further factual determinations on this issue. Following the remand, this Court granted plaintiffs' motion for leave to amend the complaint and denied Iran's motion for leave to amend the complaint and denied Iran's motion for leave to file discovery concerning personal jurisdiction.

Plaintiffs' amended complaint alleges, *inter alia*, that Iran's co-defendants, acting under Iran's control, used their dominant position on Pak Dairy's Board of Directors to (1) prevent McKesson from participating in the management of Pak Dairy and from enjoying the fundamental shareholder rights to which it was entitled; (2) prevent payment to McKesson of cash and stock dividends declared by Pak Dairy and paid to its Iranian shareholders; and (3) terminate a Technical Assistance Agreement between McKesson and Pak Dairy. Furthermore, the complaint alleges, as of October 1981, Iran had deprived McKesson entirely of the enjoyment of its ownership interest in Pak Dairy.

The parties have been engaged in discovery for the past two years. After objections by Iran to discovery requests, McKesson moved to compel discovery. This Court referred the discovery dispute to U.S. Magistrate Judge Attridge, who granted McKesson's motion in part and denied it in part. Upon cross-motions for reconsideration, this Court denied Iran's

motion and granted in part and denied in part McKesson's motion, directing Iran to answer six of plaintiffs' seven Amended Interrogatories. As to each of plaintiffs' six Amended Document Requests, the Court directed Iran to produce "all responsive documents 'within the possession or custody of the government of [Iran].' " The Court ruled that Iran was not required to produce documents "within its 'control' because that would require Iran to produce documents from agencies and instrumentalities including separate corporate juridical entities, a majority of whose stock is owned by the Islamic republic of Iran."

At a status conference in June, 1992, plaintiffs' counsel advised the Court that Iran had "wholly failed to comply with the Court's discovery order." By Order of June 30, 1992, the Court gave plaintiffs until November 1, 1992 to file a dispositive motion concerning the jurisdictional and discovery matters presented. Plaintiffs' Motion for Sanctions and for Appropriate Sanctions was subsequently filed.

McKesson's motion presents two issues: (1) has Iran failed to comply with the Court's Order of 1991 and if so, what are the appropriate sanctions; and, (2) in the alternative, has the evidence presented by plaintiffs established that Iran and its co-defendants have a principal-agent relationship such that the Court has subject-matter jurisdiction over Iran.

II. Discovery Issues

Plaintiffs assert that Iran has failed to comply with the Court's 1991 discovery order in two ways. First, Iran's answers to their interrogatories are blatantly non-responsive, plaintiffs claim. Second, plaintiffs argue, it is clear from Iran's document production that it has either failed to search its files adequately as required by the Court's order or that it has made such a search and then decided not to supply responsive

documents because the disclosure would be damaging to its case.

Under Fed.R.Civ.P. 37(b)(2), when a party fails to obey an order to provide or permit discovery, "including an order made under [Rule 37(a)]," the court in which the action is pending "may make such orders in regard to the failure as are just." Plaintiffs request that the Court enter a sanctions order against Iran as provided under Rule 37(b)(2)(A), which allows the Court to find as established "the matters regarding which the order [to provide discovery] was made or any other designated facts." Specifically, plaintiffs request the Court to find, *inter alia*, that

> [t]he Government of Iran exercised the necessary degree of control over the other defendants to create a principal/agent relationship with respect to the matters alleged in the Amended Complaint.

A. Interrogatories

Plaintiffs allege that Iran has failed to respond to interrogatories in violation of the Court's order and in violation of Fed.R.Civ.P. 33. Plainfiffs' six amended interrogatories sought to elicit from Iran information regarding, among others, the government's control over Pak Dairy and the other codefendant's and information concerning any governmental anti-American policies adversely affecting the rights of Americans as investors, shareholders and directors in Iranian corporations. Iran produced about 600 pages of documents in response to several of the interrogatories and incorporated its answer to the first interrogatory in its answers to several other interrogatories. However, Iran failed to identify which of the documents were responsive to McKesson's interrogatories, as plaintiffs requested.

Plaintiffs argue that under Rule 33(a), answers to interrogatories must be answered "separately and fully in writing under oath." Iran's answers are signed by its attorney and "declared" to be true and correct by Moshkan Mashkour. Mr. Mashkour is the legal deputy to the Head of the Bureau of International Legal Services of the Islamic Republic of Iran. Plaintiffs contend that neither person verifies the interrogatory answers "under oath" as required by the rule or alternatively, by 28 U.S.C. § 1746(1) or Local Court Rule 106(h)(1). *See* 28 U.S.C. § 1746(1) (when any matter is required to be supported, evidenced, established, or proved by a sworn declaration, oath or affidavit, unsworn declarations or statements are allowed if they are subscribed as true under penalty of perjury); Local Ct. R. 106(h)(1) (same). *But see* Fed.R.Civ.P. 43(d) (a solemn affirmation may be accepted in lieu of an oath). Second, answers are required to be direct, complete and not evasive, and not made by reference to other documents in the case, plaintiffs argue. *See Monroe v. Ridley,* 135 F.R.D. 1, 3 (D.D.C. 1990) (a party cannot answer one interrogatory by reference to another equally unresponsive answer) (citation omitted) (Lamberth, J.).

Iran contends that the Federal Rules do not require a "yes" or "no" answer. Iran also argues that it is not required to identify documents, that the same documents are responsive to many interrogatories, and that plaintiffs' interrogatories are so complicated that "it is difficult to decide" whether a particular document is responsive or not to a particular interrogatory. Finally, in a case assertedly worth more than 11 million dollars, Iran argues, it is not an imposition on plaintiffs to ask them to read through 600 pages of documents. By merely producing the documents, Iran contends, it has answered the interrogatories directly, completely, and non-evasively.

B. Document Requests

Plaintiffs also allege that Iran's responses to their document requests are inadequate and in violation of the Court's order. Plaintiffs' six amended document requests ask for, *inter alia*, copies of instructions or communications from the government to its codefendants, minutes of Pak Dairy board meetings, and articles of association or applications for doing business in Iran of any or all of the codefendants and Pak Dairy. Iran did produce, for example, some tax documents and the articles of association for some codefendants. However, Iran answered, in many instances, that except for the documents already produced (in response to Interrogatory 1), no other documents exist.

Either Iran has failed to undertake a meaningful search of its governmental files, plaintiffs contend, or it has decided deliberately to withhold responsive documents that would tend to establish its exercise or control over its codefendant government instrumentalities. For example, Iran's counsel previously argued that it would be too burdensome for Iran to produce copies of its pertinent communications to its instrumentalities because these communications were too numerous. As McKesson notes, this is in contradiction to Iran's argument now that these communications do not exist. Also, plaintiffs contend that many documents are irrelevant, listing, for example, documents regarding the issuance of mining exploration permits and the separation of an Iranian high school from the former Women's Organization. Iran responds that if there is any irrelevant information, it is on the same page as relevant material.

Plaintiffs also argue that Iran should disclose what files it has searched so that it can be ascertained whether there has been a meaningful file search. Iran initially refused to disclose this information, stating that as a sovereign government it elected not to identify the manner in which it maintains its

governmental archives and files. It now submits the declaration of Mr. Mashkour, who states that

> a competent official has been designated and he has precisely studied and fully searched the relevant government files so as to extract and place at the Plaintiffs' disposal the published and unpublished directives, by-laws, orders and communications addressed by the Govenrment to the co-defendant governmental instrumentalities holding shares in Pak Dairy. No other directives, by-laws, or communications of the kind requested except the documents already produced are in the files of the Government of Iran.

Plaintiffs argue that the Mashkour declaration is too vague and uninformative to be probative. In addition, plaintiffs contend, the declaration is self-serving as Mr. Mashkour has been employed by the Iran Government since 1984, representing Iran in "international litigations." Moreover, plaintiffs contend, this declaration about the scope of Iran's file search by an "official" and what that search revealed is inadmissible hearsay under Fed. R. Evid. 802.[1] Finally, the Pezeshk Affidavit offered by Iran to corroborate Mr. Mashkour's declaration, plaintiffs argue, does not support the assertion that Iran's files have been searched; Mr. Pezeshk merely states that he has searched the files of Pak Dairy and has found no documents which constitute instructions from the Government of Iran not to pay dividends to foreigners. Mr. Pezeshk is the managing Director and a member of the board of directors of Pak Dairy.

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[1]Mr. Mashkour's declaration states that it is based on personal knowledge and on conversations with those people who performed the document search. This is sufficient to overrule McKesson's hearsay objection.

Plaintiffs have located and produced a directive by the Foundation for the Oppressed published in Iran's Official Gazette[2] and an unpublished directive by the Prime Minister of Iran (dated January 12, 1981), neither of which were produced by Iran to plaintiffs.[3] The Prime Minister's directive was included in the record evidence of one or more arbitral proceedings at the Claims Tribunal; therefore, plaintiffs argue, this document was undeniably in the possession or custody of Iran and should have been produced by Iran. Iran, however, argues that there is no reason to believe that this document is *now* in its custody.

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[2]At the motions hearing, the Court requested that the parties file a stipulation regarding the Official Gazette. Although the parties were unable to reach complete agreement, the Court finds that there was sufficient agreement regarding the status of the Official Gazette for the Court to take judicial notice of certain facts. Therefore, the Court finds that the Official Gazette of Iran is published on a daily basis by the Joint Stock Company of Official Gazette, which is affiliated to the Ministry of Justice. According to Article 4 of the Articles of Association of the Official Gazette, the object of the Official Gazette is to manage, print and publish the Official Gazette and "to carry out printing and publication orders placed by the Ministry of Justice and its affiliated organizations." The Gazette's contents *inter alia* include: laws, regulations, by-laws, and decisions of the Government; Supreme Court and Supreme Administrative Court's precedents and judicial notices; proceedings of the Islamic Consultant Assembly (Majlis or Parliament) and opinions of the Council of Guardians; articles of associations of the Companies and notices of governmental and non-governmental organs and entities which must be published for official notification to the public or the persons concerned in accordance with relevant laws and regulations or articles of association through publication in the Gazette.

[3]Plaintiffs argue, based on *International Union (UAW) v. N.L.R.B.*, 459 F.2d 1329, 1336 (D.C. Cir. 1972), that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." Therefore, because Iran has failed to produce documents which clearly exist, plaintiffs contend, the Court should draw unfavorable inferences from Iran's failure to comply.

Iran also contends that plaintiffs' argument assumes their conclusion. Iran asserts, for example, that it has never sent any "instructions" with regards to actions by the directors of Iranian corporations because it regarded its codefendants as independent juridical entities. In addition, Iran argues, plaintiffs have not identified a single document that Iran is supposed to have in its files from Pak Dairy which it has not produced. Finally, Iran contends, without a Fed.R.Civ.P. 30(b)(6) deposition establishing otherwise, plaintiffs have failed to prove that Iran has not searched the relevant files. Plaintiffs contend that in view of Iran's categorical denial to identify which files had been searched, they were not obligated to go through a futile and costly exercise of noting a deposition of a witness located overseas. Moreover, plaintiffs note, once the Court has issued a discovery order, plaintiffs have no obligation to continue to return to the Court nor does the Court have to issue a warning to a party before imposing Rule 37(b)(2) sanctions. *See Daval Steel Products v. M/V Fakredine*, 951 F.2d 1357, 1363 (2d Cir. 1991) (provided that there is a "clearly articulated order of the court requiring specified discovery, the district court has the authority to impose Rule 37(b) sanctions for noncompliance with that order.") (citation omitted).

C. Sanctions

Plaintiffs have identified a number of instances in which Iran has skirted close to the edge of violating the Court's discovery order and the Federal Rules of Civil Procedure. Iran has been less than cooperative with plaintiff's requests. However, the Court is reluctant to find any violation of its order or of the Rules. While not endorsing Iran's tactics, the Court must be mindful of the sovereignty of Iran. Moreover, Mr. Mashkour has declared that there are no other documents of the kind requested by plaintiffs except for those already produced.[4]

[4]Mr. Mashkour's declaration is sufficient under Fed.R.Civ.P. 43(d), Affirmation in Lieu of Oath.

Mr. Mashkour also declared that the interrogatory answers were true and correct. In light of Mr. Mashkour's declaration, the Court finds that Iran did not violate the Court's order or the Federal Rules. There is no need, therefore, for the Court to address the parties' arguments regarding a finding of subject matter jurisdiction as a sanction for violation of discovery.

D. Attorneys' Fees

McKesson requests that it be awarded attorneys' fees for expenses incurred in obtaining the August 1991 discovery order and for expenses caused by Iran's continuing failure to comply with that order. Under Rule 37(a)(4), if the motion to compel is granted in part and denied in part, the Court "may apportion the reasonable expenses incurred in relation to the motion among the parties . . . in a just manner." On cross-motions for reconsideration of the Magistrate Judge's discovery order, this Court granted plaintiffs' motion in part and denied it in part. Iran's motion was denied. Given that plaintiffs' motion was not granted in full, the Court denies plaintiffs' request for attorneys' fees incurred in obtaining the discovery order.

Because the Court has found no violation by Iran of the Court's order or of the Federal Rules, plaintiffs' motion for attorneys' fees under Rule 37(b)(2) is also denied.

III. Whether the evidence establishes a principal/agent relationship

McKesson requests, in the alternative, that the Court enter the proposed findings on the basis that they are established by the record. McKesson bears the burden of asserting facts sufficient to withstand a motion to dismiss regarding whether there was a principal/agent relationship. *Foremost-McKesson*, 905 F.2d at 447.

A. Issue on remand

Iran claims that it is immune under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1611 (1988). Under the FSIA, subject matter jurisdiction is connected to sovereign immunity. Unless one of the exceptions to immunity applies, a district court in a civil action against a foreign state, or the instrumentality or agency of a foreign state, lacks subject matter jurisdiction. 28 U.S.C. § 1330(a), 1603(a), 1605-1607. Exceptions to immunity include the waiver of immunity, commercial activities occurring in the United States or causing a direct effect in this country, property expropriated in violation of international law, and non-commercial torts occurring in the United States. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683, 691 (1989). In addition, as long as service has been properly made and subject matter jurisdiction exists, personal jurisdiction under FSIA also exists.[5]

McKesson seeks to hold Iran responsible for the actions of Pak Dairy and/or its co-defendants who hold the majority of Pak Dairy shares. The FSIA applies to instrumentalities and agencies of the foreign sovereign, as well as to the state itself. *See* 28 U.S.C. § 1603(a), (b). Although under certain situations the acts of the instrumentalities or agencies can be attributed to the sovereign for jurisdictional purposes, under the FSIA the instrumentalities or agencies are accorded a presumption of independent status. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (D1983) (*"Bancec"*). The presumption of juridical separateness of entities also applies to jurisdictional issues. *See Foremost-McKesson*, 905 F.2d at 446 (citations omitted).

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[5]The Court of Appeals found that Iran had waived the separate constitutional ground of a lack of *in personam* jurisdiction. *Foremost-McKesson*, 905 F.2d at 453.

The presumption of juridical separateness may be overcome where "internationally recognized equitable principles" mandate attribution in order to avoid injustice. *Id.*, quoting *Bancec* 462 U.S. at 633-34. The *Bancec* Court suggested that the presumption would be overcome where a "corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created." *Bancec*, 462 U.S. at 629. Before attributing the actions of the agent or instrumentality to the principal for jurisdictional purposes, the Court must make a factual determination as to whether an agency relationship existed among the co-defendants. *Foremost-McKesson*, 905 F.2d at 446 (citations omitted).

In previously denying Iran's motion to dismiss, this Court relied on the determination of the Claims Tribunal that Pak Dairy and the other codefendants were corporations controlled by Iran, as defined by the Algiers Accords. The Tribunal's conclusion was based on the finding that government controlled entities held a majority of Pak Dairy's shares and that these entities also held a majority of the seats on the Pak Dairy board of directors. This Court made few findings of its own concerning the degree of control exerted by Iran over Pak Dairy and the other codefendants. *Id.* at 445 (district court made few findings although Foremost tendered "extensive affidavits in support of its position").

Although the Court of Appeals remanded the case, it agreed that the question was whether the facts as alleged by McKesson showed sufficient control by Iran over Pak Dairy such that a relationship of principal to agent was created. The Court determined that the factors which influenced the Claims Tribunal were relevant to determining whether an entity is an "agency or instrumentality" under the FSIA. However, the Court found that majority shareholding and majority control of a board of directors, without more, were not sufficient

to establish a relationship of principal to agent under the FSIA. *Foremost-McKesson*, 905 F.2d at 448 ("The Claims Tribunal's findings simply do not answer the question with respect to attribution that is posed by this case."). Moreover, the Court noted, the alleged principal/agent relationship was not a direct one, as Iran's alleged control over Pak Dairy was exercised through entities on Pak Dairy's board, "which were in turn allegedly controlled by Iran." *Id.* The Court directed that fact-finding on this issue be explicit.

The Court of Appeals did affirm this Court's ruling that for jurisdictional purposes, Iran lacked sovereign immunity under the third clause of the FSIA. Under the third clause, a foreign sovereign is deprived of immunity for actions based

> upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere . . . and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). In determining jurisdiction, the Court may only consider those actions that are commercial in nature, as jurisdiction will not obtain if the cause of action is based on a sovereign activity. *Foremost-McKesson*, 905 F.2d at 450 (citation omitted). Iran argued that the complaint stated a claim for expropriation, which if true, was a governmental act, not a commercial one. The Court of Appeals determined that there was no evidence that the alleged commercial acts were subsumed within a sovereign activity. Because there was no evidence of statutory restrictions, governmental decrees or directives depriving persons outside of Iran of the right to sell or transfer their shares, or evidence "of a government policy curtailing the payment of dividends," the Court of Appeals determined that this Court properly concluded that the alleged actions were "sufficiently commercial in nature to withstand Iran's motion to dismiss." *Id.*

Without reaching the merits of the issue, the Court of Appeals also found no error in this Court's determination that the alleged facts exhibited "sufficiently direct effects to confer subject matter jurisdiction under the third clause" of the FSIA. *Id.*

B. Record before this Court

McKesson has assembled evidence from information obtained from Pak Dairy before it discontinued communications with its U.S. shareholders in 1981, evidence derived from facts established by the Iran-U.S. Claims Tribunal in the April 1986 arbitral award, and publicly available information about the nature and policies of the Islamic Republic of Iran. McKesson relies to a large degree upon the findings of the Claims Tribunal. McKesson claims that the Court of Appeals addressed only the question of what weight this Court should give to the Tribunal's findings of control over the codefendants by Iran, not the question of what effect should be given to the Tribunal's separate findings on attribution of liability.

The Tribunal reached the conclusion that McKesson's rights in Pak Dairy were not expropriated by January 19, 1981.[6] However, the Tribunal did find that there was an interference with McKesson's rights which "while not amounting to an expropriation, gives rise to a right to compensation for the loss of enjoyment of the property in question:" cash dividends in 1979 and in 1980. The Tribunal found that the withholding of these dividends "must be considered to engage the reponsibility of the Government." *Foremost-Tehran, Inc.*, 10 Iran-U.S. Cl. Trib. Rep. 228, slip op. at 26.

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[6]The Tribunal was limited by its jurisdictional parameters to adjudicating events which occurred before January 19, 1981. Plaintiffs' suit in this Court alleges that the final expropriatory acts occurred after that date.

Iran contends that the Tribunal's findings on which McKesson relies are conclusions of law under the Algiers Accords, which unlike the FSIA, do not require a presumption of independence for agencies and instrumentalities. The Tribunal's attribution of liability to Iran, Iran argues, rested merely on the fact that Iran indirectly owned a majority of Pak Dairy's stock. McKesson contends, however, that the Tribunal begins from a presumption of independence before determining liaiblity and that the Tribunal did not hold Iran liable for the non-payment of dividends to McKesson merely on jurisdictional grounds.

The Tribunal did distinguish between its finding that the Government of Iran was liable from its finding that Pak Dairy was encompassed within the jurisdictional definition of "Iran" under the Algiers Accords[7]:

> [t]he question whether a corporation is controlled by the Government of Iran for jurisdictional purposes is distinct from that of whether the corporation or any of its shares have been expropriated. Although the relevant evidence may be largely coextensive, different considerations apply to its evaluations.

Foremost Tehran Inc., 10 Iran-U.S. Cl. Trib. Rep. 228, slip op. at 19. However, this Court is governed by the Court of Appeals' decision which specifically stated:

> [t]he legal standards employed by the Claims Tribunal to determine *liability* under the Algiers Accords are ***not coterminous*** with the standards applicable to determine a claim of attribution under FSIA.

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[7]Article VII, paragraph 3 of the Claims Settlement Declaration provides:

> "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

Foremost-McKesson, 905 F.2d at 447 (emphasis added). The Court went on to say that "[t]he Claims Tribunal's findings simply do not answer the question with respect to attribution that is posed by this case." *Id.* at 448. Therefore, the Claims Tribunal's findings on attribution of liability to Iran are not controlling on the issue of whether there was a principal/agent relationship between Iran and its codefendants, although this Court may incorporate those findings in its own decision.

C. Factual Findings

McKesson claims that its proffered evidence establishes that (1) anti-American policies were a central theme of Iran's government; (2) Iran authorized and required its agencies and instrumentalities to act as agents of the government and asserted sufficient control to ensure that they would enforce the government's anti-American policies; and (3) these codefendant agencies and instrumentalities exercised their authority as Iran's agents in the implementation of those anti-American policies at Pak Dairy, by denying shareholder benefits to McKesson for reasons unrelated to the interests of Pak Dairy.

The Court agrees that the findings of the Claims Tribunal, the other evidence submitted by McKesson[8] and the inferences

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[8]McKesson submits the affidavit of Mr. Frank Fisher, former Managing Director of Pak Dairy and an employee of the Foremost Companies between 1964 and 1979, claiming that it is part of the business records maintained by the McKesson corporation. Mr. Fisher is now deceased. Iran concedes that the affidavit was introduced into evidence at the proceedings before the Claims Tribunal. However, Iran objects to the admission of the affidavit before this Court, arguing that it is hearsay and not trustworthy as Mr. Fisher had a pecuniary interest in Pak Dairy.

The Fisher affidavit is not admissible. First, it is not part of the business records of the McKesson corporation as it was prepared for litigation before the Claims Tribunal. Second, although the affidavit was admitted into evidence before the Tribunal and apparently relied upon by the Tribunal for some of its findings, there is nothing to support McKesson's assertion

to be drawn from this evidence establish that there was a principal/agent relationship between Iran and its codefendants.

1. Iran's Anti-American Policies

This Court has already taken judicial notice of the anti-American attitude prevalent in Iran. *See* Memorandum Opinion of August 30, 1991. McKesson offers other evidence of anti-American rhetoric and acts of the Government of Iran, it asserts, because these examples demonstrate the anti-American policies implemented through the Government's control of Pak Dairy's board of directors. For example, McKesson proffers the Iranian Constitution, adopted in 1979, which states that the Government "shall employ every possible means to achieve" the prevention of foreign influence (Article 3); that the economy of the Republic shall be established to prevent foreign control of the national economy (Article 43); and, that foreigners are prohibited from establishing corporations and institutions in certain fields, including commerce (Article 81). An August 9, 1980, edict from the Revolutionary Prosecutor states that no payments for rent, business income and dividends from companies can be made to individuals who have left the country. Moreover, the edict states, the transfer of stock or partnership shares in companies for such individuals "is not authorized without the approval of the Revolutionary Prosecutor."

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that Iran had the opportunity to develop the testimony, as required by Fed. R. Evid. 804(b)(1). Finally, although affidavits from deceased persons have been admitted into evidence under Fed. R. Evid. 804(b)(5), the Fisher affidavit does not meet all the requirements of that rule; specifically, as an employee of Foremost and as a shareholder of Pak Dairy, Mr. Fisher had a pecuniary interest in the Claims Tribunal's proceedings and by extension, the proceedings here . *See Furtado v. Bishop*, 604 F.2d 80, 91 (1st Cir. 1979) (affidavit of deceased attorney admissible under Rule 804(b)(5) because, among other reasons, he was a disinterested party), *cert. denied*, 444 U.S. 1035 (1980).

Iran argues that this evidence merely supports its claim that any alleged action on its part was purely sovereign activity and not relevant to the principal/agent question. *See Gibbons v. Republic of Ireland*, 532 F. Supp. 668, 672 (D.D.C 1982) ("for purposes of determining whether a sovereign should be held liable along with its instrumentalities it is far more relevant to determine whether government officials acted in concert with employees of an instrumentality than whether they seek the same ultimate objective.") (Gesell, J.). This Court and the Court of Appeals have already determined, however, that McKesson's cause of action may be maintained as properly based on commercial activity conducted through Pak Dairy. *See Foremost-McKesson*, 905 F.2d at 450 (actions alleged were sufficiently commercial in nature to withstand Iran's motion to dismiss). Evidence of anti-Americanism is relevant to show that Iran's codefendants, in their actions on the Pak Dairy board, were acting in the interests of the Iranian Government and that their interests were the same as the government's. *See id.* at 448 (court cannot assume that the interests of a foreign state and its agencies are always the same, nor that an official from a state entity who serves on the board of directors of another such entity will always act to serve or to promote the interests of the sovereign).

2. Iran's codefendants

(a). The Foundation for the Oppressed

In *Foremost-Tehran*, the Claims Tribunal adopted its findings regarding the Foundation from an earlier case, which held that the Foundation was an entity controlled by the Government of Iran for purposes of the Algiers Accords. *See Foremost-Tehran*, 10 Iran-U.S. Cl. Trib. Rep. 228, slip op. at 18, citing *Hyatt Int'l Corp. v. Iran*, 9 Iran-U.S. Cl. Trib. Rep. 72. Iran argues, however, that the Foundation does not fit within the

definition of agency or instrumentality of Iran under the FSIA, 28 U.S.C. § 1603(b). Rather, Iran contends, the Foundation is a religious organization, it is financially independent (it has no shares) and it is not run by government officials.

There can be no dispute that the Foundation falls within 28 U.S.C. § 1603(b)(1), entity is a separate legal person or corporation, and 28 U.S.C. § 1603(b)(3), entity is neither a citizen of a State of the United States nor created under the laws of any third country. Because the Foundation has no shares, the question remains whether it is an "organ" of Iran under 28 U.S.C. § 1603(b)(2), such that all three criteria of section 1603(b) are satisfied. The evidence pertaining to whether the Foundation is an "organ" of Iran is also relevant to the question of whether there existed a principal/agent relationship between Iran and the Foundation. The Court finds that the evidence supports an affirmative finding for both of these questions.

According to the Foundation's Charter, it was established at the direction of the Ayatullah Imam Khomeini, with the approval of the Revolutionary Council, for the purpose of pooling the wealth of the Pahlavi family and others and using that wealth to help the poor. Through judgments issued by the Revolutionary Court, the government confiscated properties which the Foundation then controlled and managed. In addition, the Foundation was empowered to call upon governmental agencies and institutions, including law enforcement agents, revolutionary prosecution offices and courts, and to act itself in a prosecutorial or investigative role in the discovery and seizure of properties eligible for confiscation. According to the Foundation's Charter, the Ayatullah appointed the President (Manager) and Central Council of the Foundation. Under Article 13 of the Charter, the manager is responsible for planning the general policy of the Foundation and its implementation

after being approved by the Central Council. Finally, if the Foundation is to be dissolved, its assets are to be delivered to the government.

In 1982, the Ayatullah appointed the Prime Minister to a supervisory role in the management of the Foundation. The parties disagree about the significance of this appointment. The Claims Tribunal, in *Hyatt Int'l.*, found that the evidence established that the Majlis (National Consultative Assembly) and the office of the Prime Minister supervised the Foundation's affairs. The Tribunal excerpted from a newspaper, *Keyhan*, statements from a 1982 interview of the Supervisor of the Foundation about his regular meetings with the Prime Minister. When asked what the method of supervision of the Government over the Foundation was, the Supervisor responded:

> You know that the representative of the Religious Leader [Iman Khomeini] i.e., his excellency, Engineer Mousavi, the Prime Minister, is responsible for the Foundation and that his supervision is considered as the supervision of the cabinet over the work and operation of the Foundation for the Oppressed. In the meantime, the auditing firm of the Foundation operates under the supervision of the Prime Minister.

Hyatt Int'l Corp., 9 Iran-U.S. Cl. Trib. Rep. 72, (WESTLAW, Int Library, Iran file, at 14-15).

Iran submits the declaration of Abbass Khageh Piri, President since 1989 of the Legal Council of the Foundation for the Oppressed. Mr. Piri states that the appointment of the Prime Minister as the Imam's representative on the Foundation "was based on the Leader's personal confidence in his person and not on Mr. Mousavi's position as Prime Minister." Therefore,

Iran contends, the appointment of the Prime Minister was *ex officio*, as further evidenced by the fact that the appointment was not transferred to the constitutional successor of Engineer Mousavi.

The Court is not persuaded by Mr. Piri's declaration.[9] Mr. Piri does not state how he knows the Ayatullah's reasoning behind the appointment of the Prime Minister. Also, prior to becoming President of the Foundation's Legal Council in 1989, Mr. Piri served as counsel to various Iranian companies, and not, apparently, in any capacity with the Foundation. The appointment of the Prime Minister, in conjunction with the evidence discussed *supra*, is evidence not only that the Foundation is an "organ" of Iran but that it is also an agent of Iran.[10]

This conclusion is further buttressed by the Foundation's notice of July 3, 1980, published in the Official Gazette, which is essentially a government publication.[11] The notice stated that it was notifying "all companies and concerns" that

> in order to determine the rights of the Foundation for the Oppressed in such companies and concerns (in connection with judgments issued by revolutionary courts) they must send the list of their shareholders at the end of the year 1358 [March 20, 1980] as well as all changes in the said companies and concerns from the beginning of the year 1357 [March 21, 1979] to the Foundation for the Oppressed . . . and must refrain from [making] any

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[9]Mr. Piri's declaration is unsworn, but states that the "foregoing is true to the best of my knowledge, information and belief." The Court finds that this is sufficient under Fed. R. Civ. P. 43(d), Affirmation in Lieu of Oath.

[10]The Foundation's activities on Pak Dairy's board of directors and as a shareholder, discussed *infra*, also support the Court's conclusion that the Foundation was an agent of Iran.

[11]*See* note 2 *supra*.

> transfer of shares and/or payment to the shareholders without the confirmation of the Foundation of the Oppressed.

Iran argues that finding that the Foundation is an instrumentality of the government is like finding that the Baptist Church is an instrumentality of the United States if President Clinton served on the board.[12] As McKesson points out, however, the Baptist Church does not have the authority to take measures to discover and seize private property, with the help of prosecutorial and other law enforcement agencies. In addition, the Baptist Church has no authority to direct all companies, whether nationalized or not, to comply with such a notice as cited *supra*. Iran's argument are unavailing.

The Claims Tribunal found that the Foundation held 9.5% of Pak Dairy's shares.

(b). The Financial Organization for the Expansion of Ownership of Industrial Units

Iran has conceded that the Financial Organization is a juridically separate entity within the meaning of the FSIA. Although Iran does not admit that the Financial Organization was its agent, the evidence supports this finding. Iran does admit that the Organization's Council consists mostly of government ministers and other government officials, and that its General Meeting, made up of three government ministers, has some decisional powers. These powers include approving the balance sheet and appointing auditors. The Organization's Articles of Association indicate that it is affiliated to the

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[12]Iran argued at the motions hearing that the Ayatullah's powers over the Foundation come from his religious powers. The Claims Tribunal in *Hyatt Int'l.* determined, however, that under the Algiers Accords, the Ayatullah's religious and secular powers were not readily separable; an exercise of "religious" authority may also constitute an exercise of "governmental" authority. The Court agrees that these powers are not readily separable.

Ministry of Economic Affairs and Finance, the minister of which also serves on the General Meeting. The objective of the Financial Organization is to grant loans to laborers and agriculturists for the purpose of purchasing shares of productive agencies; in other words, the objective is to expand the ownership of industrial industries in Iran to workers and farmers.

According to Article 4 of the Financial Organization's Articles of Association, the capital for the organization is provided by and paid out of the State General income. If there are any deficits, these are covered by Iran, under Article 18. The Financial Organization, in accordance with Article 20, is governed by Iranian Government regulations related to government-owned companies in cases where the Articles of Association do not apply.

McKesson also submits two letters[13] from Dr. Mohsen Ameli, Managing Director of the Financial Organization, written on what appears to be Government of Iran letterhead. The paper states "Provisional Government of Islamic Republic of Iran" and below, "Financial Organization for the Expansion of Ownership of Productive Units (Joint Stock Company)." The first letter, undated, is to the President of the Financial Organization telling him that the June 4, 1979, general meeting of shareholders and any decision adopted at that meeting was illegal and improper. The second letter, dated April 8, 1980, is to either Sherkat Sarmayeh Gaozari Goroh Sanati Ardel or to the Investment Company of Ardel Industrial Group, or both. The letter directs that an extraordinary general meeting be held the next day to amend certain articles of the articles of association. These letters raise the inference that the Financial

[13]These letters were drawn from the record of the Claims Tribunal proceedings. McKesson submits the letters and their translations to this court.

Organization identified itself with Iran. Iran does not rebut the inference raised by these letters.

The Articles of Association and the inference raised by the letters support a finding of principal/agent relationship between Iran and the Financial Organization, as does the evidence discussed below.

The Claims Tribunal determined that, as of December 1980, the Financial Organization held 9.6% of the shares of Pak Dairy in its own name and another 11% of the shares in the names of workers and farmers for whom the Financial Organization retained the voting rights. The Financial Organization also held two seats on Pak Dairy's board of directors.

(c) The Industries and Mines Bank ("IMB")

The Claims Tribunal found that the IMB was government controlled because it was nationalized in June 1979, along with all banks and insurance companies in Iran.[14] The Court finds that the evidence and the inferences to be drawn from it also establish that the IMB and Iran had an agent/principal relationship during the period in question.

McKesson submits various laws and the Articles of Association of the IMB. Under the Law of Nationalization of Banks, the government was "obligated to determine management for these banks." Following the nationalization of all banks, the Legal Bill on the Administration of the Banks' Affairs was enacted. It provided for the governing authority of the banks to reside in a General Meeting and a High Council. The General Meeting is composed of government officials and is convened and presided over by the Minister of Finance and Economic

[14]Iran does not contest that the IMB falls within the definition of agency or instrumentality of the FSIA, nor could it do so. Iran owns all shares of the IMB.

Affairs. Under the Legal Bill, the duties of the General Meeting include approval of the balance sheet and budget, appointment of the board of directors of the banks as proposed by the High Council and appointment of the managers of the banks and legal auditors. In addition, the General Meeting approves the "employment, financial, administrative and transaction regulations" of the banks.

Six of the eight members of the High Council of the Banks are representatives of government officials, including a representative of the Ministry of Finance and Economic Affairs. The other two members are the President of the Central Bank of Iran and Director General of Bank Melli Iran. Duties of the High Council, which meets once a week "at least at the call of the president of the Council or three members of the Council," include preparing employment "as well as financial, administrative and transaction regulations of the banks for final approval by the general meetings," making decisions on the "general economic, credit, and administrative policies of the banks as well as other questions related to the administration of banks," and "[m]aking efforts and taking intiative in the proper administration and productivity of the banks, their constant development in the direction of serving people and the economy of the country and increasing the incomes in accordance with the Islamic principles."

The Articles of Association for the IMB incorporate the Legal Bill for the administration of banks. Under the articles, the position of managing director and a board of directors are established, members of which are not to engage in governmental or commercial jobs during their office terms. The managing director is the highest administrative and executive officer of the bank and has the authority to act as an agent of the bank. However, included in the managing director's duties is the responsibility to execute all of the decisions of

the General Assembly (the General Meeting) and the Supreme Council (High Council). Likewise, while the board of directors has the authority to administer the bank, included in its duties is the responsibility to prepare primary drafts of regulations for proposal to the Supreme Council for final approval by the General Assembly. Thus, even though the managing director and board members are not government officials or representatives, their final authority is limited by the General Assembly and Supreme Council which are composed of government officials or representatives. This evidence, along with the evidence discussed *infra*, is sufficient to show the control necessary to establish a principal/agent relationship between Iran and the IMB.

In 1979, the IMB took control of the National Iranian Banks Investment Company (NIBIC). NICIB owned 10% of Pak Dairy's shares. The Claims Tribunal found that IMB, with NIBIC's shares, owned 13.6% of Pak Dairy's shares. The Tribunal also found that by some time in November of 1980, NIBIC held two seats and IMB held one seat on Pak Dairy's board of directors.

(d). The National Investment Company of Iran (NICI)

Iran argues, initially, that NICI is not a governmental instrumentality within the FSIA because it is a joint stock company operated under Iran's Commercial Code and a majority of its shares are privately owned. The Claims Tribunal determined that NICI was a governmental entity under the Algiers Accords. It found that, after the nationalization of the banks and insurance companies in 1979, NICI's board of directors was dominated by these government-owned companies; the board of nine directors was composed of four banks, two insurance companies and three private individuals.

This Court, of course, must employ the standards of the

FSIA. As with the Foundation for the Oppressed, the question is whether NICI is an "organ" of the government of Iran. McKesson argues that Article 3 of NICI's articles of association establishes that NICI was structured to implement the government's economic agenda by furthering the expansion of industrial ownership and thereby to "distribute wealth and income between the citizens of the country more appropriately . . . and to reduce the risk of central ownership in one company." NICI's economic role, under governmental supervision, plus control of its board by government-owned companies, McKesson contends, establishes that NICI was an agent of Iran.

The Court agrees that the evidence establishes that NICI was an agency or instrumentality of Iran under the FSIA. The evidence discussed *infra* also establishes that NICI was acting as an agent of Iran through its actions as a shareholder.

The Claims Tribunal determined that, as of December 1980, NICI held 8.3% of Pak Dairy's shares.

(e). Pak Dairy

The Claims Tribunal found that government controlled entities controlled 52% of Pak Dairy shares. The Tribunal also found that by some point in 1980, these entities occupied a majority of seven seats on Pak Dairy's board of directors and dominated its affairs. Therefore, based on its finding of majority shareholding and majority membership on the board by government controlled entities, the Tribunal found that Pak Dairy was government controlled.

Iran argues initially that Pak Dairy is not an instrumentality under the FSIA because Iran does not control a majority of its stock. Iran asserts that because the Foundation and NICI are not government instrumentalities, their holdings in Pak

Dairy's stock must be subtracted from the government's holdings (9.5% and 8.3% respectively), leaving the government holdings in Pak Dairy amounting to only 34.2%. As discussed *supra*, however, the Court has determined that the Foundation and NICI were agencies or instrumentalities under the FSIA. Therefore, the Court adopts the Claims Tribunal's findings that 52% of Pak Dairy's shares were owned by governmental organizations and that six of the seven seats on the board of directors were government controlled. Pak Dairy was, therefore, an agency or instrumentality of Iran under the FSIA.

The question remains, though, whether there was an principal/agent relationship between Iran and Pak Dairy. As the Court of Appeals noted, this involves determining whether Iran's codefendants were acting as agents of Iran in controlling Pak Dairy.

3. Codefendants' Actions

In previously determining that Iran had a principal/agent relationship with Pak Dairy and its codefendants, this Court relied upon the Claims Tribunal's findings that Iran "controlled" its codefendants. The Court also found on the face of McKesson's complaint allegations which, although conclusory, would amount to the degree of control necessary to attribute the actions of the codefendants to the Government of Iran. *See* Memorandum Opinion, April 18, 1989 at p. 6 & n.8. The Court of Appeals determined, however, that the question before the Claims Tribunal, whether Iran controlled the codefendants, was not the same as the question of attribution under the FSIA. The Tribunal's findings, without more, were not sufficient for a finding of agency.

In now finding that a principal/agent relationship existed between Iran and its codefendants, including Pak Dairy, this Court relies not only upon the findings of the Claims Tribunal but upon other evidence not examined by the Tribunal. For ex-

ample, McKesson submits minutes from several meetings which either were not before the Tribunal or were not relied upon by the Tribunal.[15] McKesson also submits other evidence from which the Court can draw inferences of any agency relationship: the letters from the Financial Organization written on Government of Iran letterhead and the directive from the Foundation from the Oppressed, both discussed *supra*. The Court finds that this evidence, in addition to the findings by the Claims Tribunal, supports a finding of principal/agent relationship. In accordance with the Court of Appeals' directions on remand, the Court details the following evidence as the basis for its findings of principal/agent relationship between Iran and its codefendants. *Foremost-McKesson*, 905 F.2d at 446.

(a). Evidence of prinicpal/agent relationship

Activities on the board of Pak Dairy's directors and at the shareholders' meetings are revealing of the principal/agent relationship between Iran and its codefendants. In October 1979, two representatives of the Financial Organization, Dr. Ameli and Mr. Karasi, were elected to the Pak Dairy board of directors. The Claims Tribunal determined that with this election, the Financial Organization began to exercise a leading role in Pak Dairy's affairs. Minutes from the October 14, 1979, Pak Dairy meeting of shareholders show that in addition to Dr. Ameli and Mr. Karbasi, Mr. Frank Fisher of Foremost was also elected to the board. The general meeting of the board had been held at the request of the Financial Organization

[15]The minutes of the meetings relied upon by the Court and not mentioned by the Claims Tribunal include the December 5, 1979, special meeting of the board of directors; the April 9, 1980, shareholders' meeting; and, the October 22, 1980, special meeting of the shareholders. Also not relied upon by the Tribunal but submitted here for consideration: the resignation letter of Engineer Jahangir Haghshenas and the April 1988 affidavit of Leonard M. Patterson, Jr.

to approve certain changes in the Articles of Association of Pak Dairy. This request was similar to the one made by the Financial Organization in the letter written on Government of Iran letterhead, discussed *supra*.

At the board meeting of November 15, 1979, Mr. Fisher resigned as managing director and Mr. Asghari was appointed to succeed him. Foremost[16], however, kept two places on the board: Mr. Dinaut and a proxy for Mr. Fisher. Also at the November meeting, Dr. Ameli and Mr. Karbasi each penned a handwritten note on the minutes. Mr. Karbasi agreed with Dr. Ameli that "all foreign contracts of the company must be reconsidered, and are not valid in my opinion, and any payment in this connection shall be illegal." The minutes also reflect the board's control over the managing director. For example, while the managing director has the power to run the "current affairs of the company," the board must approve getting the loans from the bank, investments in other companies, the sale of "movables or immovables assets," and the signing of any contracts such as a capital expenditure contract.

At a special meeting of the board on December 5, 1979, only Engineer Haghshenas, Dr. Ameli, Dr. Abadi, and Mr. Ashghari were present. The board reiterated the views expressed in November. It explained to Mr. Asghari, the managing director, that he had authority to carry out current purchasing requirements but that "other important matters should be presented to the Board . . . for approval and confirmation." The board also discussed Pak Dairy's foreign contracts, including loans from banks. Dr. Ameli stated that with regard to these contracts, "under the present circumstances no payment should be made to foreigners . . . until later when the matter is approved by the Board of Directors."

[16]At that time, the company was known as Foremost-McKesson.

Discussions over the payment of dividends also revealed the government's control over Pak Dairy's affairs. At the February 1980 board of directors' meeting, Dr. Ameli stated that he did not regard Pak Dairy as a "real joint stock holding company and that the profit of the people and the government should also be considered." The discussion revolved around how much of a dividend should be paid and to whom it should be paid. Mr. Haghshenas was concerned that "he could not explain to the share holders that a company that has operated well and has made profits, will not pay dividends to its share holders." Dr. Karbasi, a representative of the Financial Organization, requested that the distribution of dividends "be debated at length and studied further by his organization."

At the March 1980 meeting, the question of distributing profits for fiscal 1979 was again discussed. The representatives of the Financial Organization, Dr. Ameli and Mr. Karbasi, recommended that the minimum regular profit should be divided among shareholders, that the balance of profit should be credited to the company's reserve fund, and that no premium shares should issue. The reason for their recommendation: the presence of foreign shareholders in the company. The board agreed upon a dividend of 18% cash profit and 10% in premium shares. In making the decision, the board noted that

> [t]he profits made by the company belong to its shareholders and, within the laws and regulations, they have a right to make profit from their capital proportionality; therefore, distribution in cash money, paying dividends to shares, or keeping part of the profits undivided, will not deprive the share holders from their legitimate rights, whether they be local or foreigner. *We should also bear in mind, that, because of the existing dispute between Iran and the United States, payment of profits to foreign share*

> *holders has to be kept pending for the time being.* (emphasis added)

At the shareholders' meeting on April 9, 1980, a representative of the Financial Organization, Mr. Seid Ahmad Hedayati, stated that "with regard to the Government Policy" and for the purpose of strengthening the financial ability of the Company, "only the minimum dividend" provided by Article 90 of the Commercial Law, *i.e.*. 10% of the year's profit, should be paid out and the balance kept by the company. A dispute broke out among the representatives of the small shareholders, who considered such a dividend insignificant, and the representatives of those who supported the Financial Organization's proposal, which included the government representatives. A representative of the Mineral and Industrial Development Bank (a predecessor of the IMB) opined that "there is no opposition between the private shareholders and the government firms, but, the difficulty connected with the foreign shareholders who may proceed to withdraw from the Iranian funds abroad if any dividend is approved." A resolution was reached to defer the issue until the "representatives of the government firms would get in touch with their heads to find a probable solution to the problem."

As a result of this dispute over dividends, the chairman of Pak Dairy's board of directors, Engineer Jahangir Haghshenas, tendered his letter of resignation. In a particularly illuminating letter dated April 1980, Engineer Haghshenas described the issue:

> [d]uring discussions in the annual general meeting and several Board meetings preceeding [sic] it, some were in the opinion that if out of some 40% profit 10% stock dividend were declared the *foreign shareholders were also going to benefit from it which would contradict the government's policy;* against this

> reasoning it must be pointed [sic] that since the revolution not a cent was paid, in cash or bonus shares or in the form of Directors' bonus, to foreign shareholders, because such payments required transfer of foreign exchange which in itself was controled [sic] by the government. (emphasis added)

Engineer Haghshenas was also concerned about any misinterpretation of his position. He wanted to be certain that no one could attribute his statements "to defending foreign shareholders." Engineer Haghshenas went on to say that because 83% of the shares were now owned or controlled by the government (including foreign shares) and because the board should be a real representative of the shareholders, he was resigning so that new board members with such qualifications could be elected.

Dr. Ameli presided over the next shareholders' meeting, April 14, 1980, where the distribution of dividends was again discussed. A representative of NICI, in a remark revealing a government agenda, stated that with regard "to the prohibition of payment to foreigners," NICI agreed with the payment of 10% net cash dividend and 10% stock dividend. Cash and stock dividends were approved at this meeting. Iranian shareholders received dividends. Although McKesson requested its dividend, it did not receive it. Mr. Asghari, in a telex dated May 27, 1980, replied that "due to decision and instruction of the board of directors," Pak Dairy could not pay any money "for any reason to foreign share holders."[17]

[17]At the June 3, 1980, board meeting, the managing director also explained that even though the foreign stock holders had requested, in writing, that the interest on their shares for 1978 be paid in Rials, according to the decision of the board, no payment would be made to the foreigners. Dr. Ameli reminded the managing director that it was not appropriate for him to answer such an inquiry without consulting with the board.

The composition of the board of directors reflected government control. At the October 22, 1980, special meeting of the shareholders, the dismissal of Mr. Fisher from the board of directors was approved by the vote of the government representatives. The shareholders voted for representatives from the Foundation, the IMB, and NICI to replace Mr. Ashghari, Mr. Fisher and Engineer Haghshenas. Dr. Ameli also explained that representatives of the government on the board of directors received no salaries "and would even return any bonuses received to the organizations they work for." These directors' concern, Dr. Ameli stated, is "to develop self-sufficiency and independence from abroad," among others. Furthermore, he noted, they remained committed "to serve God, the people and the country," and those elected represented the "interests of the country," as well as the investors and stock holders.

At the November 1980 ordinary general meeting of the shareholders, Foremost's proxies held by Mr. Vahdati were declared to be legally defective because they had not been certified by Iran's Consulate abroad. The shareholders approved the actions taken at the October 1980 meeting, including the dismissal of Mr. Fisher and the election of the representatives of the Foundation for the Oppressed, the IMB, and NICI to replace Mr. Fisher, Engineer Haghshenas, and Mr. Asghari. Prior to the vote, Dr. Ameli addressed the meeting, noting that the

> main objective is . . . to protect the interests of the country as well as to preserve the industry and the interests of all the shareholders including the minor ones within the framework of the general interests of the country; and the Board of Directors has done all in its power to achieve this end.

Dr. Ameli also noted that "our country, in the present conditions, is in need of directors who can practically contribute to the preservation as well as to the administration of the industries of the country."

In 1981, two Foremost representatives, Mr. Yahyazadeh and Mr. Sohrabi, were elected to the board of directors. On October 23, 1981, however, Foremost sent a telex to the Pak Dairy submitting the resignation of its two directors because "Foremost's presence at company meetings has not prevented the steady decline in value of Pak and the deterioration of its profits under the management and [c]ontrol of the government of Iran."[18] In response, Pak Dairy sent a telex dated November 11, 1981 stating its readiness to take "proper measures" regarding dividends[19] and asking that McKesson appoint different directors. Pak Dairy also contested McKesson's telex, stating that it was probably sent in the "baseles hope" of filing a lawsuit against the Government of Iran.

Mr. Leonard M. Patterson, Jr., associate general counsel of McKesson Corporation, averred[20] that a dividend was declared by Pak Dairy for the year 1980, in 1981. He averred that this dividend, as well as dividends declared by Pak Dairy in all subsequent years, were paid to Iranian shareholders; McKesson, however, has not received either cash or stock dividends as a shareholder. Furthermore, Mr. Patterson averred, since 1981, other than copies of filings submitted by Pak Dairy in the Arbitral Proceedings, McKesson has not received from Pak Dairy any materials directed to shareholders,

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[18]Exhibit 11, attached to the affidavit of Masoud Pezeshk, dated July 17, 1991.

[19]Mr. Pezeshk stated that, in recent years, McKessons's dividends have been credited to its account.

[20]Patterson affidavit, April 1988, aattached to plaintiff's motion for partial summary judgment.

"including, but not limited to, dividend notices, annual reports, accountants' reports and management information."

D. Applicable Law

(1). Attribution

Both parties agree that under the *Bancec* decision, the question of whether the actions of an instrumentality should be attributed to the sovereign is determined with reference to the principles common to both international law and U.S. federal common law. *See Bancec*, 462 U.S. at 621-623. In *Bancec* the Court noted that courts in the United States and abroad have recognized that an incorporated entity is not to be regarded as legally separate from its owners in all circumstances. When the corporate entity is "so extensively controlled by its owner that a relationship of principal and agent is created," each party may be held liable for the actions of the other. *Id.* at 629. In addition, the Court recognized " 'the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice.' " *Id.* (citations omitted). Finally, the Court noted that in particular, the corporate form will not be given effect "where it is interposed to defeat legislative policies . . . [or] to defeat an overriding public policy." *Id.* at 630 (citations omitted). In *Bancec*, the Court declined to adhere to the corporate form because doing so would have allowed the sovereign state to avoid liabiity on a counterclaim while it sought relief itself in U.S. courts.

McKesson argues that *Bancec* basically supplies three tests, to be used in the alternative, to determine whether the corporate form should be disregarded. In this case, McKesson asserts, Iran availed itself of Pak Dairy's corporate form to perpetuate injuries on McKesson. Therefore, to allow Iran

to hide behind that corporate form to shield itself from all liability for its actions would be grossly inequitable.

Furthermore, McKesson argues, principles of international law, such as those set forth in *Case Concerning the Barcelona Traction, Light & Power Co.*, 1970 I.C.J. 3, and cited in *Bancec*, 462 U.S. at 628 n.20, support a finding of principal/agent relationship here. In *Barcelona Traction*, the International Court of Justice acknowledged that, as a matter of international law, the separate status of an incorporated entity may be disregarded in certain exceptional circumstances, such as when "lifting the corporate veil" is necessary to prevent "the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance . . . or to prevent the evasion of legal requirements or of obligations."

Iran argues that cases interpreting the FSIA are more on point than the international and domestic authorities[21] upon which McKesson relies. Iran points out that in the majority of the cases interpreting the FSIA, courts did not permit attribution.[22] The Court of Appeals in *Foremost-McKesson* cited

[21]McKesson cites to the Restatement (Second) of Agency, § 1, Comment a (1958), for the proposition that "the relation of agency is created as a result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act." McKesson also cites several international law authorities, including the *Barcelona* case discussed *supra*.

[22]Iran also claims that *Gibbons v. Republic of Ireland*, 532 F. Supp. 668 (D.D.C. 1982) (Gesell, J.), discussed *supra*, supports its theory that attribution is not appropriate here. However, in *Gibbons*, Ireland submitted undisputed affidavits which established that no representative of the government was involved in the activities of its codefendants. In addition, *Gibbons* was decided before *Bancec*.

to several of these cases, noting that majority shareholding and majority control of a board of directors, without more, are not sufficient to establish a relationship of principal to agent under the FSIA. *See Foremost-McKesson*, 905 F.2d at 448, citing *Hester Int'l. v. Nigeria*, 879 F.2d 170, 181 (5th Cir. 1989) ("The two factors of 100% ownership and appointment of the Board of Directors cannot by themselves force a court to disregard the separateness of the juridical entities."); *Hercaire Int'l. Inc. v. Argentina*, 821 F.2d 559, 565 (11th Cir. 1987) (100% stock ownership alone is insufficient to overcome presumption of separateness and there was no showing that the foreign sovereign exercised such extensive control so as to find principal/agent relationship nor was there any resulting fraud or injustice resulting from preserving the corporate form) and *Baglab Ltd. v. Johnson Matthey Bankers, Ltd.*, 665 F. Supp. 289, 297 (S.D.N.Y. 1987) (immunity existed where plaintiff failed to substantiate its contentions that the instrumentality either made the specific loan decision of a bank it acquired or exercised general control over the bank such that the bank might be considered its agent).

In several of the other cases which Iran cites, courts refused plaintiff's claim of attribution for jurisdictional purposes either because there was not enough evidence to rebut the separate juridical existence of the defendants, *see Gregorian v. Izvestia*, 871 F.2d 1515, 1530 (9th Cir.) (in determining minimum contacts necessary for personal jurisdiction over a Soviet trading organization, court could not count as contacts the activities of its codefendant the U.S.S.R. through its Ministry of Foreign Trade, the Soviet Embassy, the Soviet Consulate, or its other trade contacts), *cert. denied*, 493 U.S. 891 (1989); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 419-20 (5th Cir. 1987) (Mexican agency, Pemex, did not waive its immunity when, pursuant to Mexican law, it had a general contract with a Mexican company who, in a subcontract with

a Texas company, agreed to adjudicate any dispute in U.S. courts; Pemex was not a party to the subcontract nor did it enter into the general contract merely to avoid U.S. jurisdiction), *cert. denied*, 484 U.S. 1043 (1988) and *Banco Nacional de Cuba v. Chemical Bank*, 782 F.2d 377, 378, 380 (2d Cir. 1986) (court refused to disregard separate juridical form of bank because bank had not participated in expropriation of Cuban electric company nor had bank received any of the electric company's assets; in addition, Cuban government did not misuse bank's corporate form); because there was no basis for piercing the corporate veil based on fraud or misuse, *see Letelier v. Republic of Chile*, 748 F.2d 790, 794-5 & nn. 1-2 (2d Cir. 1984) (joint participation in a tort is not an abuse of the corporate form allowing the court to pierce the corporate veil; court reversed Rule 37 sanctions disregarding corporation's juridical separateness because there was no finding that the actions of the corporation and Chile were one and the same or that Chile had ignored the corporation's separate status), *cert. denied*, 471 U.S. 1125 (1985); or, because there were no equitable principles requiring the piercing of the corporate veil. *See Dayton v. Czechoslovak Socialist Republic*, 672 F. Supp. 7, 10 (D.D.C. 1986) (relying on *Bancec*, the court determined that because the defendants were not availing themselves of the benefits of American courts and because two codefendants were separate entities from the state, there was no reason to ignore their separate juridical existence) (Oberdorfer, J.), *aff'd.*, 834 F.2d 203 (D.C. Cir. 1987).

Iran also relies on *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528 (5th Cir.), *cert. denied*, 113 S.Ct. 413 (1992). In *Arriba*, plaintiff, a foreign corporation with its principal place of business in the United States, sued the Mexican agency Pemex for damages stemming from a failed contract between plaintiff and an arm of Pemex's union, in part on a theory of attribution. The Court refused to find a principal/agent relationship

between Pemex and its union for several reasons. First, there was "neither common ownership nor any similar legal relationship between these entities." *Id.* at 535. Second, there was no evidence that Pemex had authorized the other defendants to act for it. *Id.* at 536 (domestic agency principles require some manifestation by the principal communicating actual or apparent authority to an agent). Finally, the Court noted that not only did plaintiff's theory fail to allege a principal/agent relationship, "it cannot be proved without massive, intrusive, discovery in Mexico." *Id.* The Court refused to disregard the presumption of separate juridical entities.

This Court is reminded of *Bancec*'s statement that there is "no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded." *Bancec*, 462 U.S. at 633. On the evidence proffered by McKesson, the case at bar is distinct from *Arriba* and the other cases in which the courts did not allow attribution for jurisdictional purposes. McKesson's evidence establishes a principal/agent relationship between Iran and its codefendants.

McKesson alleges that the actions by Pak Dairy's board and shareholders resulted in an expropriation culminating in either late 1981 or early 1982 and were taken in implementation of the declared policy of Iran to deny Americans participation in the business and economic life of Iran. Government-owned or controlled entities owned a majority of stock and held a majority of seats on Pak Dairy's board of directors. As outlined *supra*, the board controlled the day-to-day operations of Pak Dairy and the shareholders voted on important financial and corporate governance matters. For example, although the board recognized the authority and power of the managing director to make purchases, the board reminded the managing director that it had to approve and confirm other important matters. *See Kalamazoo Spice Extraction Co. v. Provisional*

Military, 616 F. Supp. 660, 666 (W.D. Mich. 1985) (government exercised direct control over the company by appointing a majority of the board of directors and by requiring that all checks in excess of a certain amount had to be signed by one of the government appointed directors). Upon recommendations by the board, the shareholders, a majority of which were government-owned, determined when to pay cash and stock dividends. The board decided that Pak Dairy would not pay any money to foreign shareholders, including McKesson. This extensive involvement in the day-to-day operations of Pak Dairy is evidence of a principal/agent relationship between Iran and Pak Dairy.

In addition, there have been some manifestations by the government of Iran that Pak Dairy, and its government shareholders and board members, *could* act for Iran. The example of the shareholders' meeting which was deferred until the members could consult with their respective heads, who in many cases were government officials, at least raises the inference, not rebutted by Iran, that the shareholders were acting as agents of Iran. Similarly, Iran has also not provided an explanation for the letters from Dr. Ameli of the Financial Organization written on what appears to be Government of Iran letterhead. These letters certainly raise the inference that Iran was allowing the Financial Organization to act as its agent. *See Arriba*, 962 F.2d at 536 (domestic agency principles require some manifestation by the principal communicating actual authority to an agent or apparent authority to a third party).

In addition to the evidence establishing the principal/agent relationship, the Court also finds that it would be manifestly unjust to allow Iran to hide behind its agents' separate juridical personalities to avoid responsibility for actions taken by those agents on Iran's behalf. As McKesson points out, plaintiffs are unlikely to have a remedy against those agencies in the United States, given the difficulties of establishing personal

jurisdiction. The unlikelihood of a remedy against Iran or its agents in the Iranian legal system is also high.

Iran contends that none of McKesson's evidence proves that there was a principal/agent relationship between Iran and its codefendants. Assuming *arguendo* the truth of McKesson's evidence, Iran asserts that any action taken by Dr. Ameli and other representatives of the Financial Organization was for the purpose of shifting control to the employees of the company[23], not for the purpose of ignoring the corporate form of Pak Dairy. McKesson argues, however, that according to the Financial Organization's articles of association, its function was not to take control of the corporations away from their shareholders and give it to the employees, but to expand the class of shareholders. In any event, regardless of its purpose, the Financial Organization was implementing the policies of the government, under the guidance of the government. In this sense, the Financial Organization was acting as Iran's agent.

Second, Iran offers the declaration of Moshkan Mashkour who asserts that McKesson has mistakenly translated minutes of the board meeting in wich the directors adjourned in order to consult with their government heads. Mr. Mashkour declares that the proper translation is "respective heads," referring to the responsible officials and heads of the shareholding institutions. However, even if Mr. Mashkour is correct, as McKesson has shown, the responsible officials and heads of the shareholding institutions were in many instances government officials.

Third, Iran argues that all of the evidence which McKesson has offered relates to conduct which took place before January 19, 1981, the cut-off date for the Claims Tribunal. The Tribunal

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[23] Iran enacted the Law for the Expansion of Ownership of Productive Units in 1976, which provided that control of companies was to shift from shareholders to employees of the companies.

found no expropriation by January 19, 1981. McKesson, however, is arguing that a "creeping expropriation" happened in this case, with the expropriation culmininating in late 1981 or 1982.[24] The Tribunal explained the applicable law:

> A claim for a taking is outstanding on the day of the taking of the property. Where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property, the breach forming the cause of action is deemed to take place on the day when the interference has ripened into more or less irreversible deprivation of property rather than on the beginning date of the events.

The Court agrees with McKesson that, although the Tribunal found that an expropriation did not occur by January 19, 1981, the evidence and the inferences to be drawn from it demonstrate that an expropriation could have occurred later.[25] Moreover, McKesson has offered other evidence which either was not before the Tribunal or not considered by it.

Fourth, Iran argues, assuming *arguendo* that it was Iran's policy to expropriate the shares of Americans in Iranian companies, there is evidence in the record that Pak Dairy's directors refused to follow the policy. Iran submits the affidavit of Mr. Pezeshk, who states that the shares of the Foremost companies have not been confiscated but that the Foremost companies have failed to request those dividends in accordance with the rules and provisions of the Articles of Association. Therefore, Iran asserts, there has been no expropriation of Foremost's shares.

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[24]McKesson is also alleging tortious interference with its rights and interests as a minority shareholder.

[25]The issue of whether the Claims Tribunal's determination in favor of Iran on the expropriation claim was based on the merits or on lack of jurisdiction was not before the Court of Appeals. *Foremost-McKesson*, 905 F.2d at 441 n.8.

The Claims Tribunal apparently rejected this same argument in finding that Iran was liable for Pak Dairy's clear breach of duty in failing to pay the two dividends. In addition, Mr. Pezeshk does not state what McKesson would need to do to receive the dividends; as McKesson observes, surely this litigation would not be ongoing merely because McKesson failed to observe some procedural requirement. Moreover, it does appear from the record that McKesson has not received either dividends or reports or other materials of the type sent out by Pak Dairy to its other shareholders.[26]

Iran has offered the declaration of Mr. Mashkour and the affidavit of Mr. Pezeshk to support its assertion that there is no principal/agent relationship between it and Pak Dairy. Mr. Mashkour declares that Iran does not "intervene in their [codefendants'] internal management, budget, and day-to-day operations." However, Mr. Mashkour has only been directly involved in international litigations of Iran since 1984, three years after the date in which plaintiffs allege any expropriation. Similarly, Mr. Pezeshk declares that the "Government of the Islamic Republic of Iran has no role in [Pak Dairy's] administration." Mr. Pezeshk, though, was not involved with Pak Dairy prior to 1986. Mr. Mashkour's and Mr. Pezeshk's statements do not rebut the finding of a principal/agent relationship.

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[26]Mr. Pezeshk does state that "[n]o report or written information is sent to other shareholders of the company as a matter of course." However, Mr. Pezeshk was only appointed managing director of Pak Dairy on January 15, 1986. Prior to that, he held no position in and had no contact or dealing with Pak Dairy. Therefore, there would have been a period of at least four years (1981 to 1985) in which McKesson did not receive any shareholder information, regardless of what happened after Mr. Pezeshk's appointment as managing director.

(2). Commercial Activity and Direct Effects

The Court of Appeals upheld this Court's finding that the actions alleged by McKesson were sufficiently commercial in nature to withstand Iran's motion to dismiss. *See Foremost-McKesson*, 905 F.2d at 449-50 (district court found that the plaintiff's allegation " 'sound in the nature of a corporate dispute between majority and minority shareholders.' "). Without reaching the merits of the issue, the Court also found no error in the determination that the facts alleged by McKesson exhibited sufficiently direct effects to confer subject matter jurisdiction. The Court found that the alleged effects were "foreseeable, substantial and direct." *Foremost-McKesson*, 905 F.2d at 451.

Iran now argues that the applicable law has changed, citing to *Republic of Argentina v. Weltover*, 112 S. Ct. 2160 (1992). Iran contends that *Weltover* specifically rejected the substantial and foreseeable test in favor of an "immediate consequence" test. McKesson contends that *Weltover* did not narrow the construction of the "direct effect" test but expanded it to find FSIA jurisdiction for foreign plaintiffs against a foreign nation, where the nexus with the United States was far weaker than in this case.[27]

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[27]The parties also dispute their respective burdens at this stage in the proceeding. Iran argues that because the Court of Appeals did not reach the merits of the direct effects issue, McKesson must establish by a preponderance of the evidence all facts upon which the Court's jurisdiction depends. McKesson contends that because the Court of Appeals found no error in this Court's determination that there were sufficient direct effects, the burden has shifted to Iran. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 707-708 (9th Cir. 1992) (once the plaintiff offers evidence that an exception under the FSIA applies, the burden shifts to the party claiming immunity to prove by a preponderance of the evidence that the exception does not apply), *cert. denied*, 113 S. Ct. 1812 (1993) (citation omitted).

Weltover does not appear to have overruled the Court of Appeals' conclusion in *Foremost-McKesson* that the alleged effects of "freezing-out American corporations in their ownership of Pak Dairy" were at least as substantial and direct as effects alleged in other cases. *Foremost-McKesson*, 905 F.2d at 451. *Weltover* is factually distinct from the instant case.[28] The plaintiffs in *Weltover* were two Panamanian corporations and a Swiss bank who sued the Republic of Argentina on a breach-of-contract claim. Argentina had issued bonds, called "Bonods," which called for payment of interest and principal in U.S. dollars, payment to be made at various cities, including New York, at the election of the creditor. When Argentina rescheduled payment of the Bonods, plaintiffs refused to accept the rescheduling and insisted on full payment in New York, which Argentina refused. The Court determined that under the "commercial" exception of the FSIA, Argentina's actions were sufficently commercial and direct in their effect in the United States; therefore, jurisdiction was proper in the District Court.

In applying the "direct effects" test, the Court rejected the suggestion that §1605(a)(2) contains an "unexpressed require-

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[28]The other two cases relied on by Iran are also factually distinct. In *International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8 (2d Cir. 1989), the plaintiff was a corporation organized in the Cayman Islands with its principal place of business in the Bahamas. The Court found that there was no direct effect in the United States because the various contracts did not provide for payment in the United States and the use of American personnel and equipment in Iraq was incidental. *Id.* at 11. McKesson, however, is an American corporation. In *Martin v. Republic of South Africa*, 836 F.2d 91 (2d Cir. 1987), plaintiff was an American citizen who had been injured in South Africa. The Court found that there was no direct effect in the United States because the accident did not occur in the United States and plaintiff did not return to the United States for more than a year subsequent to the accident. *Id.* at 95 (a claim of personal injuries sustained in a foreign state is not sufficient to support direct effects in the United States). McKesson has not filed a claim of personal injuries.

ment of 'substantiality' or 'foreseeability.' " *Weltover*, 112 S. Ct. at 2168. Instead, the Court recognized that an effect is direct if it follows " 'as an immediate consequence of the defendant's . . . activity.' " *Id.*, (citation omitted). Because New York was the place of performance for Argentina's ultimate contractual obligations, the Court found that the rescheduling of those obligations "necessarily had a 'direct effect' in the United States." *Id.* Thus, the Court rejected Argentina's suggestion that the direct effect requirement could not be satisfied where there was a foreign plaintiff with no other connection to the United States. *Id.* at 2168-69.

As McKesson suggests and the Court of Appeals has affirmed, the Court's finding of a direct effect in the United States is fully supported by the evidence, regardless of any changes engendered by *Weltover*. The Court of Appeals enumerated the many contacts between Pak Dairy and the McKesson companies in the United States, including the constant flow of capital, management personnel, engineering data, and machinery between the United States and Iran. As a direct, and immediate, consequence of Iran's allegedly wrongful acts, there was a discontinuance of dividends, a stoppage of shareholder communications, and a cessation in the transfer of machinery and other supplies between the two countries, the impact of which was felt in the United States.[29] *See Foremost-McKesson*, 905 F.2d at 451; *cf. Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1545 (11th Cir. 1993) (*Weltover* acknowledged that the "direct effect" requirement might be construed as embodying the "minimum contacts"

[29]Mr. Patterson averred that machinery, equipment and other supplies sent from Foremost in the United States to Pak Dairy until late 1979 were to be paid for in dollars. Patterson Aff., April 1988 at ¶11. Mr. Patterson also averred that prior to being discontinued, there were regular flows of funds coming to Foremost in the United States in the form of dividends from Pak Dairy. *Id. at* ¶ 12.

test of the Due Process Clause) (citations omitted); *AMPAC Group, Inc. v. Republic of Honduras*, 797 F. Supp. 973 (S.D. Fla. 1992) (plaintiff, American corporation, alleged sufficiently direct effects where the breach of contract caused it to "expend substantial sums of money, incur substantial costs and charges, suffer injury to its business reputation and lose substantial profits" in Florida; under *Weltover*, these harms followed as an "immediate consequence" of defendant's activities). Therefore, regardless of whether *Weltover* changed the applicable direct effects test, McKesson has met its burden of proving that there were direct effects in the United States as an immediate result of Pak Dairy's actions.

IV. Conclusion

In conclusion, the Court finds that Iran has not violated the 1991 discovery order nor the Federal Rules. The Court, therefore, denies plantiffs' motion for sanctions. The Court also finds that McKesson has met its burden of asserting facts sufficient for the Court to find that a principal/agent relationship existed between Iran and its codefendants. *See Foremost-McKesson*, 905 F.2d at 447 (plaintiff bears burden) (citations omitted). Therefore, the the Court has subject matter jurisdiction over Iran for the acts of its instrumentalities. Iran's motion to dismiss is denied. An appropriate order accompanies this memorandum opinion.

/s/ Thomas A. Flannery

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
AUG 23 1993
CLERK, US
DISTRICT COURT
DISTRICT OF
COLUMBIA

Civil Action No. 82-0220

McKESSON CORPORATION, *et al.*,

Plaintiffs,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Defendants.

ORDER

This matter comes before the Court on plaintiffs' motion for sanctions under Fed.R.Civ.P. 37 and for appropriate findings. This matter is also before the Court on remand from the Court's denial of Iran's motion to dismiss for lack of subject matter jurisdiction. Upon consideration of the plaintiffs' motion, Iran's opposition, plaintiffs' reply thereto, and the entire record and for the reasons set forth in the accompanying Memorandum Opinion, it is this 23rd day of August, 1993,

ORDERED that plaintiffs' motion for sanctions is denied; and it is

ORDERED that Iran's motion to dismiss is denied. This Court has subject matter jurisdiction over Iran.

/s/ Thomas A. Flannery

UNITED STATES DISTRICT JUDGE

APPENDIX F

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 22, 1990 Decided June 15, 1990

No. 89-7126

FOREMOST-McKESSON, INC., et al.,
APPELLEES

v.

THE ISLAMIC REPUBLIC OF IRAN,
APPELLANT

Appeal from the United States District Court for the District of Columbia (Civil Action No. 82-0220)

Thomas G. Corcoran, Jr., with whom *Henry M. Lloyd* was on the brief, for appellant.

Mark R. Joelson, with whom *Mark N. Bravin* was on the brief, for appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: Edwards, *Circuit Judge*, Robinson, *Senior Circuit Judge*, and Revercomb,* *District Judge*.

Opinion for the Court filed by *Circuit Judge* Edwards.

Edwards, *Circuit Judge:* This interlocutory appeal involves a claim by a United States business that the appellant, Islamic Republic of Iran ("Iran"), acting through the various codefendants who controlled the shares and the board of directors of a dairy company in Iran, used its majority position to lock the appellee out of the management of the dairy and to deny the appellee its share of the company's earnings. Iran claims that it is immune from suit under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §1330, §§ 1602-1611 (1988). Iran also contends that, because it lacks the constitutionally mandated minimum contacts with the forum, the District Court could not exercise *in personam* jurisdiction. Accordingly, Iran seeks reversal of the District Court's denial of its motion to dismiss.

The plaintiff-appellee companies are Foremost-McKesson, Inc., and its wholly owned subsidiaries Foremost Tehran, Inc., Foremost Shir, Inc., Foremost Iran Corporation, Foremost Foods, Inc. (individually and collectively "Foremost"), and the Overseas Private Investment Corporation ("OPIC"). In addition to responding to the issues raised by Iran, the plaintiff-appellees challenge the judgment of the District Court allowing Iran to amend its complaint to include the defenses of sovereign immunity and lack of personal jurisdiction under FSIA. Foremost also argues that, under the Treaty of Amity,[1] Iran waived its foreign sovereign immunity as to suits arising out of any commercial activity.

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*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. §292(a) (1988).

[1]*See* Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, 8 U.S.T. 899 (1957), *reprinted in* Brief for Appellees, addendum at 37.

With respect to the claims concerning sovereign immunity, we are constrained to remand for further development of the record. Under FSIA, agencies and instrumentalities of a foreign nation are presumed to be separate from each other and from the foreign state. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 625-28 (1983). It is not enough to show that various government entities or officials represent a majority of the shareholders or constitute a majority of the board of directors of the applicable agency or instrumentality; in other words, mere involvement by the state in the affairs of an agency or instrumentality does not answer the question whether the agency or instrumentality is controlled by the state for purposes of FSIA. The presumption of separateness (and whether it has been rebutted) affects the jurisdiction of the court, as well as the liability of the state, under FSIA: in order for the case to proceed under FSIA, the District Court must consider whether Iran so dominated the operations of the dairy "that a relationship of principal and agent is created." *Id.* at 629.

Although we affirm most of the holdings of the District Court,[2] we reject the legal test that it employed to determine Iran's claim to sovereign immunity. On remand, the District Court will be required to make more extensive preliminary findings regarding the nature and degree of control exerted by Iran over the dairy and its shareholders.[3] With regard to Iran's

[2]*See Foremost-McKesson, Inv. v. Islamic Republic of Iran*, Civ. Action No. 82-0220 (D.D.C. Aug. 18, 1988) (*"Foremost I"*), *reprinted in* Appendix ("App.") 91; *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, Civ. Action No. 82-0220 (D.D.C. Nov. 7, 1988) (*"Foremost II"*), *reprinted in* App. 101; *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, Civ. Action No. 82-0220 (D.D.C. Apr. 18, 1989) (*"Foremost III"*), *reprinted in* App. 3.

[3]We emphasize the procedural posture of our conclusions. We are not making a final determination whether jurisdiction exists under FSIA; nor are we making any final factual determinations. Rather, we are addressing whether the District Court properly denied Iran's motion to

constitutional in *personam* ("minimum contacts") jurisdiction claim, we conclude that, because this issue was never raised below, the claim has been waived.

I. Background

The procedural history of this case is unusually complicated. Foremost alleges that in 1959, at the request of a group of Iranian nationals, Foremost-McKesson, Inc., a Maryland corporation with its principal place of business in California, assisted in establishing a dairy, the Sherkat Sahami Labaniat Pasteurize Pak ("Pak Dairy"), in the Republic of Iran. From 1959 to 1979, Foremost provided the top management for the dairy and controlled its Board of Directors. During the period relevant in the instant case, Foremost held thirty-one percent of the equity interest in the dairy.

On January 22, 1982, Foremost and the Overseas Private Investment Corporation[4] filed a complaint in the District Court against Iran and several agencies and instrumentalities of Iran through which Foremost claims Iran acted. These agencies and instrumentalities included the Financial Organization for the Expansion of Ownership of Productive Units, the National Investment Company of Iran, Industrial and Mining Development Bank of Iran, the Foundation for the Oppressed and Pak Dairy. The complaint alleged that Iran, acting through the codefendant agencies and instrumentalities, illegally divested Foremost of its investment in Pak Dairy. Foremost and OPIC sought compensation for the entire value of their jointly held

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dismiss. In resolving this question, we base our judgment on the facts as alleged by the plaintiff and generously construed in the plaintiff's favor. *See Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026 (D.C. Cir. 1982); *see also Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1000 n.1 (D.C. Cir. 1985).

[4]OPIC is an agency of the United States that insures private overseas investments of United States nationals.

19.84% insured equity interest in Pak Dairy,[5] allegedly valued at not less than $7,040,000, plus interest; compensation for their share in any dividends declared and not received before the alleged divestment of their equity interest; and various other damages, including attorneys' fees. *See* Complaint ¶¶38,-39, ***reprinted in*** Appendix ("App.") 36.

On June 29, 1982, Iran responded to the complaint in what it titled an "Answer to Complaint." *See* Answer to Complaint [hereinafter 1982 Answer], ***reprinted in*** App. 46. In this response, Iran did not state the defenses raised in its motion to dismiss and did not admit or deny Foremost's averments, *cf.* FED. R. CIV. P. 8(b); rather, Iran contended that prosecution of the suit was barred by the so-called Algiers Accords of January 19, 1981,[6] and that, pursuant to Executive Order No. 12,294, 46 Fed. Reg. 14,111 (1981) ("Executive Order"), the "complaint ha[d] no legal effect other than to toll the applicable statute of limitations." 1982 Answer at 1, ***reprinted in*** App. 46.[7] Pursuant to the terms of the Executive Order, the District Court took no action in this case while Foremost and OPIC presented their claims against Iran to the Iran-United States Claims Tribunal ("Claims Tribunal") in the Hague.

On April 10, 1986, the Claims Tribunal concluded that interference with Foremost's rights had not, by January 19, 1981, amounted to an expropriation. ***See Foremost Tehran, Inc. v.***

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[5]Foremost sought damages only for the insured portion of its shareholding: 64% of its 31% ownership or 19.84% of the total shares.

[6]Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 Int'l L. Materials 224 (1981) [hereinafter Algiers Accords].

[7]The Executive Order provided that plaintiffs with claims arguably within the jurisdiction of the Claims Tribunal could file suit in federal court in order to toll the period of limitations for commencing the action. *See* 46 Fed. Reg. at 14,111. The Executive Order "purports only to 'suspend' the claims, not divest the federal court of 'jurisdiction.' " *Dames & Moore v. Regan*, 453 U.S. 654, 864 (1981).

Islamic Republic of Iran, 10 Iran-United States Claims Trib. Rep. 228, 250, *reprinted in* App. 78.[8] However, the Claims Tribunal concluded that Pak Dairy had unlawfully withheld from Foremost cash dividends declared in 1979 and 1980, and it therefore awarded Foremost approximately $900,000 plus interest, against Iran. The Claims Tribunal also concluded that Pak Dairy unlawfully failed to deliver to Foremost stock certificates representing stock dividends declared in 1980 and that Pak Dairy had breached contractual obligations in failing to pay rental payments due and to return upon demand certain machines to Foremost. The Claims Tribunal awarded Foremost in excess of $500,000 in damages against Pak Dairy for the contract breaches. *See id.* at 257-58, *reprinted in* App. 88. Iran paid the amounts awarded out of the security account established at The Hague pursuant to the provisions of the Algiers Accords.

On April 1, 1988, the plaintiffs — still seeking damages for claimed losses — revived this lawsuit by filing a motion for partial summary judgment against Iran on the issue of liability. The plaintiffs alleged facts that arguably support a conclusion that the dairy was expropriated *after* the 1981 limit to the Claims Tribunal's jurisdiction. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, Civ. Action No. 82-0220, slip op. at 2 (D.D.C. Apr. 18, 1989) (*"Foremost III"*), *reprinted in* App. 4.[9]

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[8]A claim must have been "outstanding" on January 19, 1981, to fall within the jurisdiction of the Claims Tribunal. *See* Algiers Accords, *supra* note 6, at art. II, ¶ 1; *see also Foremost Tehran, Inc. v. Iran*, 10 Iran-Untied States Claims Trib. Rep. at 233 n.5, *reprinted in* App. 54 n.2. The parties apparently dispute whether the Claims Tribunal's determination in favor of Iran on the expropriation claim was based on the merits or on lack of jurisdiction. However, that issue is not before us in this appeal, and, accordingly, we do not address that issue.

[9]The Supreme Court explained in *Dames & Moore*, 453 U.S. at 684-85, that, "[a]s we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will 'revive' and become judicially enforceable in United States courts."

In response to Foremost's reactivation of the suit, Iran moved to strike its 1982 Answer from the record and separately moved to stay the proceedings. The District Court denied both motions, but it denied the motion to strike without prejudice to a motion by Iran to file an amended answer. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, Civ. Action No. 82-0220, slip op. at 1 (D.D.C. Aug. 18, 1988) ("*Foremost I*"), *reprinted in* App. 91. Iran then moved to amend its 1982 Answer and the District Court granted its motion. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, Civ. Action No. 82-0220, slip op. at 5 (D.D.C. Nov. 8, 1988) ("*Foremost II*"), *reprinted in* in App. 105. The District Court rejected Foremost's and OPIC's contentions that the court did not have authority to or, alternatively, could not, without abusing its discretion, permit Iran to assert certain jurisdictional defenses not included in the 1982 Answer. *Id.*

Concurrently, Iran filed a motion to dismiss the underlying complaint, pursuant to Rule 12(b)(1) and (2) of the Federal Rules of Civil Procedure, for lack of jurisdiction under FSIA. The District Court denied Iran's motion to dismiss. *See Foremost III*, Civ Action No. 82-0220 (D.D.C. Apr. 18, 1989), *reprinted in* in App. 3. Iran then filed this interlocutory appeal.

II. ANALYSIS

A. *Introduction*

The Foreign Sovereign Immunities Act connects the issue of subject matter jurisdiction to the issue of sovereign immunity. *See 28 U.S.C.* § 1330(a). District Courts in a civil action against a foreign state, or the agency or instrumentality of a foreign state, lack subject matter jurisdiction unless one of the exeptions to immunity applies. *See* 28 U.S.C. §§ 1330(a), 1603(a), 1605-1607. Personal jurisdiction under FSIA exists

so long as subject matter jurisdiction exists and service has been properly made pursuant to 28 U.S.C. § 1608. *See* 28 U.S.C. § 1330(b). Thus, if none of the exceptions to sovereign immunity applies, district courts lack jurisdiction in suits against a foreign state, or an agency or instrumentality thereof.[10]

Iran and Foremost present numerous challenges to the District Court determinations bearing on both subject and personal jurisdiction under FSIA. At the center of the challenges is the question whether Iran is immune from suit under FSIA. In the analysis that follows, we first address the issue of the jurisdiction of *this* court to review the District Court's decisions on interlocutory appeal. We next consider whether the District Court properly permited Iran to amend its 1982 Answer to include the defense of sovereign immunity. Third, we address Iran's claim that the District Court erred in attributing to Iran the actions of Pak Dairy and its majority shareholders, which are allegedly agencies or instrumentalities of Iran. Fourth, we consider whether the District Court erred in concluding that the actions attributed to Iran in the complaint were sufficiently commercial and the effects sufficiently "direct" — pursuant to the commercial activity exception to sovereign immunity, *see* U.S.C. §1605(a)(2) — to withstand Iran's motion to dismiss. Next we consider whether Iran waived its immunity by signing the Treaty of Amity. Finally, we address the claims regarding constitutional *in personam* ("minimum contacts") jurisdiction.

B. *Interlocutory Appeal*

Neither party has challenged this court's authority to review the District Court's determinations on interlocutory

[10]The *statutory* requirements for personal jurisdiction do not affect the constitutional *in personam* jurisdiction requirement that, pursuant to the due process clause of the Fifth Amendment, certain "minimum contacts" must exist between the person and the jurisdiction. *See, e.g., Gilson v. Republic of Ireland*, 682 F.2d 1022, 1028 (D.C. Cir. 1982).

appeal. Even where our jurisdiction is uncontested by the parties, however, we are constrained to act only within our jurisdictional authority. *See Tuck v. Pan American Health Organization*, 668 F.2d 547, 549 (D.C. Cir. 1981) ("Jurisdiction is, of necessity, the first issue for an Article III court. The federal courts are courts of limited jurisdiction, and they lack the power to presume the existence of jurisdiction in order to dispose of a case on any other grounds.").

In this case, we adhere to the law of this circuit, *see Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1000 (D.C. Cir. 1985), and other circuits as well, *see, e.g., Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir.), *cert. denied*, 110 S. Ct. 333 (1989); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450-51 (6th Cir. 1988); *Compania Mexicana de Aviacion, S.A. v. United States District Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (*per curiam*); *Reale Int'l, Inc. v. Federal Republic of Nigeria*, 647 F.2d 330, 331 & n.4 (2d Cir. 1981); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 816 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982), in granting interlocutory appeal of the District Court's denial of the foreign state's motion to dismiss on grounds of sovereign immunity. Such an appeal comes within the ambit of the "collateral order doctrine" articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949), because, as the Seventh Circuit explained, "sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits." *Rush-Presbyterian-St. Luke's Medical Center*, 877 F.2d at 576 n.2.

C. *Amendment of the 1982 Answer to Include the Defense of Sovereign Immunity*

Foremost contends that the District Court erred in granting Iran's motion to amend its complaint to include the defense

of sovereign immunity. Foremost argues that by filing the 1982 Answer without asserting the defense of sovereign immunity, Iran permanently waived its immunity "by implication," pursuant to 28 U.S.C. § 1605(a)(1). We cannot agree.

Section 1605(a)(1) provides that a foreign sovereign is not "immune from the jurisdiction of courts of the United States . . .in any case . . . in which the foreign state has waived its immunity either explicitly or by implication." Foremost is correct in asserting that, in most instances, a state's failure to assert sovereign immunity in a responsive pleading will constitute a waiver of the defense. But the situation here is different because, in 1982, Iran did not respond substantively to any of the averments in the complants or pose any defenses to the claims; instead, Iran merely argued that the action should proceed in another forum, which it then did. Iran's actions in these circumstances did not constitute an implied waiver.

It is true that the House report accompanying FSIA provides that "[a]n implicit waiver would . . . include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." H. REP. No. 1487, 94th Cong., 2d Sess. 18 (1976). We agree with the Seventh Circuit, however, that the example of an implied waiver

> given in the legislative history — filing a responsive pleading without raising an immunity defense — demonstrates that Congress anticipated, at a minimum, that waiver would not be found absent a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so.

Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 378 (7th Cir. 1985) (citation omitted). Iran's 1982 Answer does not exhibit such a conscious decision or opportunity.

The 1982 Answer does not admit or deny any of the averments upon which Foremost relied; nor does it state any defenses to the claims Foremost asserted. *Cf.* FED. R. CIV. P. 8(b). Indeed, Iran explicitly stated in the 1982 Answer that "the action commenced by the filing of plaintiffs' complaint has no legal effect other than to toll the applicable statute of limiations" and that "no response to plaintiffs' complaint is required." 1982 Answer at 1, 2, ***reprinted in*** App. 46, 47. As though to dispel any doubt, Iran further stated that "[t]he foregoing is without prejudice to any of defendant's rights against the United States or plaintiffs, either in this forum or before the Arbitral Tribunal." *Id.* at 2, ***reprinted in*** App. 47. While such statements would not, in most contexts, excuse the failure to assert a defense in a responsive pleading, the circumstances of this case are unusual because of the Executive Order. Iran contended, and Foremost conceded below, that Executive Order No. 12,294 did not even contemplate the filing of a responsive pleading in cases, like this one, that were referred to the Claims Tribunal under the Algiers Accords. *See Foremost I,* slip op. at 5 n.6, ***reprinted in*** App. 95 & n.6. We need not reach the issue whether the 1982 Answer is a responsive pleading for purposes of the Federal Rules of Civil Procedure. In the unusual circumstances of this case, it is clear that Iran did not make a "conscious decision to take part in the litigation" before the District Court.

Application of the implied waiver provision in the instant case would be inconsistent with the substantial precedent construing the implied waiver provision narrowly. The legislative history of FSIA gives three examples of circumstances in which courts have found implied waivers: (1) a foreign state has agreed to arbitration in another country; (2) a foreign state has agreed that the law of a particular country governs a contract; or (3) a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity. *See,*

H. REP. No. 1487, 94th Cong., 2d Sess. 18 (1976); SEN. REP. No. 1310, 94th Cong., 2d Sess. 18 (1976). In reviewing the case law bearing on the breadth of the implicit waiver provision, the Seventh Circuit noted that "[c]ases involving arbitration clauses illustrate that provisions allegedly waiving sovereign immunity are narrowly construed" and that the narrow construction of the implicit waiver clause is also evident in "the line of cases holding that a contract's waiver of immunity does not apply to third parties not privy to the contract." *Frolova*, 761 F.2d at 377; *see also id.* at n.10 (citing cases). The *Frolova* court further noted that, with regard to contract provisions, "courts rarely find that a nation has waived its sovereign immunity, particularly with respect to suits brought by third parties, without strong evidence that this is what the foreign state intended." *Id.* at 377.

In rejecting the plaintiff's contention that the foreign sovereign had implicitly waived its immunity by not defending the action, the Seventh Circuit further noted that

> [t]he case law evidences a reticence to find a waiver from the nature of a foreign state's participation in litigation. For example, in *Castro v. Saudi Arabia*, 510 F. Supp. [309, 311-12 (W.D. Tex. 1980)], the court held that the defendant's failure to timely answer the complaint did not waive sovereign immunity. And in *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 277-78 (2d Cir. 1984), the court ruled that the district court did not err in finding that sovereign immuity was not waived, although the defendant never filed a responsive pleading but instead filed several motions which did not assert sovereign immunity, and a Rule 12(b)(1) motion to dismiss based on sovereign immunity was not filed until over two and one-half years after the complaint was filed.

Id. at 378.[11]

Finally, the mechanistic application of the implied waiver urged by Foremost would be inconsistent with the notions of "grace and comity" that underlie the statutory scheme. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). In effecting these underlying policy concerns, this court noted in *Practical Concepts*, that "[i]ntolerant adherence to default judgments against foreign states could adversely affect this nation's relations with other nations and 'undermine the State Department's continuing efforts to encourage . . . foreign sovereigns generally [ ] to resolve disputes within the United States' legal framework.' " 811 F.2d at 1551 n.19 (quoting Brief for the United States as Amicus Curiae at 13-15). In this regard, the District Court "speculate[d] that an intolerant elevation of form over substance in this case, by deeming Iran's original 'answer' to have waived the defense of sovereign immunity, will almost certainly undermine the confidence of foreign states in the fairness of our legal system." *Foremost II*, slip op. at 18-19, *reprinted in* App 118-19. We agree.

On the record before us, we conclude that the District Court properly permitted Iran to amend the 1982 Answer to include the defense of sovereign immunity.[12]

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[11]In *Practical Concepts, Inc. v. Republic of Bolivia*, this court concluded that, even though Bolivia's telegram acknowledging receipt of process might be an "appearance" under Federal Rule of Civil Procedure 55(b)(2), it was not an "appearance" for purposes of FSIA so as to bar Bolivia's assertion of sovereign immunity for the first time in its objection to a default judgment. 811 F.2d 1543, 1546 & n.6. (D.C. Cir. 1987).

[12]We also find Foremost's assertion that the District Court abused its discretion in granting leave to amend completely devoid of merit. Rule 15(a) of the Federal Rules of Civil Procedure provides in relevant part that "a party may amend the party's pleading only by leave of court of by written consent of the adverse party; and leave shall be freely given when justice so requires." FED.R. CIV. P. 15(a). Such grant here cer-

D. *Attributing Acts to the Sovereign*

Before proceeding to consider the various exceptions to sovereign immunity at issue in this case, we must first address Iran's attribution argument. In this suit, Foremost seeks to hold the foreign sovereign of Iran responsible for the actions of Pak Dairy and/or the entities holding the majority of Pak Dairy shares. Iran claims that the District Court erred in attributing to Iran the actions of the Board of Directors of Pak Dairy, even for the purposes of jurisdiction. The District Court made few findings of its own regarding the degree of control exerted by Iran over Pak Dairy or over the shareholder-entities that Foremost alleges are government controlled, although Foremost tendered extensive affidavits in support of its position, *see, e.g.*, Affidavit of Leonard M. Patterson, Jr., *reprinted in* Brief for Appellees addendum at 1-16; Affidavit of Frank Fisher, *reprinted in* in Brief for Appellees addendum at 17-36. Instead, the District Court concluded that the Claims Tribunal had decided in Foremost's favor an issue "sufficiently related to permit reliance on the Claims Tribunal's finding, . . . at least at this stage in the proceedings." *Foremost III*, slip op. at 6, *reprinted in* App. 8.

While we agree with the District Court that the issue is "whether the government of Iran exercised the necessary degree of control over the other defendants to create a principal/agent relationship and thus permit this court to deem Iran responsible for their actions," *id.*, we conclude that the question

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tainly did not constitute an abuse of discretion. As the Supreme Court has explained,

> [i]n the absence of any apparent or declared reason — such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962).

of attribution under FSIA is not , as the District Court concluded, the "same question, or at least a very similar" question, *id.*, to the one decided in Foremost's favor by the Claims Tribunal. Thus, we must remand to the District Court so that it may make further factual determinations in light of the more rigorous attribution standard required by FSIA. The Claims Tribunal's findings, without more, are not sufficient to answer the question posed by Iran's motion to dismiss for want of jurisdiction under FSIA.

1. *The Legal Standard Under FSIA*

FSIA applies to instrumentalities and agencies of the foreign sovereign, as well as to the state itself. *See* 28 U.S.C. § 1603(a), (b).[13] But instrumentalities and agencies are accorded a presumption of independent status. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983) ("*Bancec*"). In *Bancec*, the Supreme Court applied this presumption in the liability context, considering the question whether a claim of a foreign agency was subject to set-off for the debts of its parent government. The *Bancec* Court explained that the presumption of juridical separateness may be overcome where "internationally recognized equitable principles" mandate attribution in order to avoid injustice, *id.* at 633-34, and suggested that the presumption

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[13]FSIA defines a "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). An "agency or intrumentality of a foreign state" means any entity

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

28 U.S.C. § 1603(b).

would be overcome where "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created." *Id.* at 629. The House Report accompanying FSIA set forth the reasons for separating the liabilities of one state instrumentality from those of another or from those of the state. The House Report explained that "[t]here are compelling reasons for" the presumption of separateness in 28 U.S.C. § 1610(b):

> If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.

H. REP. No. 1487, 94th Cong., 2d Sess. 29-30 (1976); *Bancec*, 462 U.S. at 628 (quoting same passage).

The presumption of the juridical separateness of entities also applies to jurisdictional issues. *See, e.g., Gilson v. Republic of Ireland*, 682 F.2d 1022, 1029-30 (D.C. Cir. 1982); *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 (5th Cir. 1989). As noted in the Restatement, "[w]hen a state instrumentality is not immune . . ., for instance because the claim arises out of a commercial activity, the claim is *ordinarily to be brought only against the instrumentality.*" 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 452 comment c (1987) (emphasis added). In *Gilson*, as here, the plaintiff brought an action against a foreign state, the Republic of Ireland and instrumentalities thereof, for a variety of alleged commercial misdeeds. *See* 682 F.2d at 1024. This court acknowledged that " 'the activities of an agent may be attributed to the principal for jurisdictional purposes.' " *Id.* at 1026 n.16 (quoting *East Europe Domestic Int'l Sales Corp. v. Terra*, 4676 F. Supp. 383, 390 (S.D.N.Y.),

aff'd mem., 610 F.2d 806 (2d Cir 1979)); *see also id.* at 1029-30. But the *Gilson* court concluded that the subject matter jurisdiction determination could not be made absent factual determinations regarding whether an agency relationship existed among the various defendants. *See id.* at 1026 n.16, 1029. In other words, absent an agency relationship, the court lacks subject matter jurisdiction over the foreign state for the acts of its instumentality. *See Hester Int'l Corp.*, 879 F.2d at 176, 181; *see also Gilson*, 682 F.2d at 1026 n.16, 1029-30. Hence, in the instant case, the District Court must determine whether the facts as alleged by Foremost — subject, of course, to challenge by Iran — show sufficient control by Iran over Pak Dairy to create a relationship of principal to agent.

It is further clear that the *plaintiff* bears the burden of asserting facts sufficient to withstand a motion to dismiss regarding the agency relationship. *See Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 296-97 (S.D.N.Y. 1987); *cf. Hester*, 879 F.2d at 176 (plaintiff "bears the burden of proving the agency relationship" at trial); *Letelier v. Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984) ("Plaintiffs had the burden of proving that [the state instrumentality] was not entitled to separate recognition"), *cert. denied*, 471 U.S. 1125 (1985). Thus, we cannot agree with Foremost that the findings of the Claims Tribunal alone are sufficient to address Iran's motion to dismiss for want of agency between Pak Dairy and Iran. The legal standards employed by the Claims Tribunal to detemine liability under the Algiers Accords are not coterminous with the standards applicable to determine a claim of attribution under FSIA.

Under the Algiers Accords, Iran agreed by international compact to assume responsibility for compensating United States nationals not only for claims against Iran itself but also for claims against "any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof." *See* Algiers Accords, *supra*

note 6, at art. VII ¶ 3. The Claims Tribunal held that "[t]he two main indicators of government control of a corporation are the identity of its shareholders and the composition and behavior of its board of directors." *See Foremost Tehran, Inc. v. Iran*, 10 Iran-United States Trib. Rep. at 241-42, *reprinted in* App. 66. Because it was found that government controlled entities held a majority of the shares in Pak Dairy and that these entities also held a majority of the seats on the board of directors, the Claims Tribunal concluded that Pak Dairy was a corporation controlled by the government of Iran.[14]

[14]*See Foremost Tehran, Inc. v. Iran*, 10 Iran-United States Claims Trib. Rep. at 242, *reprinted in* App. 67-68. A list of Pak Dairy's shareholders as of December 1979 and December 1980 indicated that Industrial and Mining Development Bank of Iran ("IMDBI," now the Industries and Mines Bank) held 3.6% of Pak Dairy's shares; National Iranian Banks Investment Company ("NIBIC") 10%; National Investment Company of Iran ("NICI") 8.3%; the Foundation for the Oppressed 9.5%; and the Financial Organization for the Expansion of Ownership of Industrial Units (Financial Organization") 9.% — or 41.0% altogether. In addition, 11% of the shares were held by workers and farmers who had purchased shares from the Financial Organization, for which Financial Organization retained the voting rights. *See id.*, *reprinted in* App. 67. Before the Claims Tribunal, the parties agreed that the Financial Organization is an entity controlled by Iran. *See id.* at 241, *reprinted in* App. 65. The Financial Organization's charter was enacted by the Iranian Parliament and the Minister of the Ministry of Economic Affairs and Finance serves as Chair of its General Assembly. However, NICI and the Foundation for the Oppressed denied that they are controlled entities. *See id.* at 233, *reprinted in* App. 55. The Claims Tribunal, looking to the nationalized bank and nationalized insurance ownership of NICI, rejected the argument that NICI was not a government entity. *See id.* at 241, *reprinted in* App. 65-66. With regard to the Foundation for the Oppressed, the Claims Tribunal followed its previous determination in concluding that the Foundation is an instrumentality controlled by the government of Iran. *See id.* at 240, *reprinted in* App. 65. The Claims Tribunal also concluded the IMDBI is under governmental control by virtue of the nationalization of all banks. *See id.* at 241, *reprinted in* App. 66. In turn, it concluded that NIBIC was under the ultimate control of the Iranian government because IMDBI was NIBIC's largest shareholder. *See id.* The Claims Tribunal further reasoned that even were this 52% majority not conclusive as to control, by sometime in 1980, six of the seven Board seats were government controlled. *See id.* at 242, *reprinted in* App. 67.

Thus, under the Algiers Accords, because of majority shareholding and majority control of the board of directors, Pak Dairy was seen as a government agency or instrumentality for which Iran had agreed to assume responsibility. We recognize that the same factors that influenced the Claims Tribunal to find liability under the Algiers Accords are relevant to determining whether an entity is an "agency or instrumentality" under section 1603(a) of FSIA. But these factors are *not* conclusive with respect to a claim of attribution under FSIA, *i.e.*, where a plaintiff seeks to overcome the presumption that a foreign state and agencies and instrumentalities thereof are separate juridical identities under FSIA. *See Hester*, 879 F.2d at 177 n.5.

Majority shareholding and majority control of a board of directors, without more, are not sufficient to establish a relationship of principal to agent under FSIA. *See, e.g., Bancec*, 462 U.S. at 614, 620-21, 623 (looking to principles of internaional law and federal common law to determine when instrumentalities should not be treated as distinct from the sovereign — though the government owned all the stock and appointed delegates from governmental ministries to all the positions on the Governing Board); *Hester*, 879 F.2d at 181. ("The two factors of 100% ownership and appointment of the Board of Directors cannot by themselves force a court to disregard the separateness of the judicial entities."); *Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 565 (11th Cir. 1987) (concluding that 100% stock ownership alone is insufficient to overcome the presumption of separate juridical existence and that there was no showing that the foreign sovereign exercised "such extensive control . . . as to warrant a finding of principal and agent," nor could the court "perceive any 'fraud or injustice' which results from insulating [the instrumentality's] property from attachment in aid of execution of the judgment against" the foreign state); *Baglab Ltd.*, 665 F.

Supp. at 297 (instrumentality immune from suit where plaintiff failed to substantiate its contentions that the instrumentality either made the specific loan decision of a bank it acquired or exercised "general control over the day-to-day activities of [the codefendant bank] such that [the codefendant bank] might be considered its agent"). The Claims Tribunal's findings simply do not answer the question with respect to attribution that is posed by this case.

Moreover, here, Iran's alleged control over Pak Dairy was exercised through entities on Pak Dairy's Board, which were in turn allegedly controlled by Iran. Thus, the alleged principal/agent relationship is not a direct one and, hence, the showing required to support a claim of attribution is far from straightforward. It cannot be presumed that the interests of a foreign state and its agencies or instrumentalities always are the same. Nor can it be assumed that an official from a state entity who serves on the board of directors of another such entity always will act to serve or promote the interests of the sovereign. Thus, the question concerning an alleged agent/principal relationship between the foreign state and an agency or instrumentality thereof does not involve a meaningless inquiry. The District Court will be required to address this issue on remand.

2. *Conclusory Allegations*

The District Court found "on the face of Foremost's complaint allegations which, although conclusory, would amount to the degree of control necessary to attribute the actions of the co-defendants to the Government of Iran." *Foremost III*, slip op. at 6 n.8, *reprinted in* in App. 8 n.8. Where such conclusory allegations are challenged by the sovereign, the plaintiff must provide further proof of government involvement in order to overcome the presumption of juridical separateness. Deter-

mination of "who is and is not an agent of whom will be in great part factual," *Gilson*, 682 F.2d at 1029, and the fact-finding should be "explicit," *id.* at 1026. In the instant case, the fact-findings were not sufficiently explicit.

In *Gilson*, this court determined that dismissal of the action for lack of subject matter and personal jurisdiction was "premature in light of the dearth of fact-finding done by the district court thus far," *id.*, and the court remanded for further development of the facts. Here, we conclude that the District Court's denial of Iran's motion to dismiss was premature in light of the dearth of fact-finding and we remand for further development of the facts as to the relationship between Iran and Pak Dairy.

Where, as with foreign sovereigns, immunity involves protection from suit, not merely a defense to liability, more than the usual is required of trial courts in making pretrial factual and legal determinations. In such circumstances, it is particularly important that the court "satisfy itself of its authority to hear the case," *Prakash v. American University*, 727 F.2d 1174, 1179 (D.C. Cir. 1984), *before* trial. "[P]ostponing the determination of subject matter jurisdiction until some point during or after trial" would "frustrate the significance and benefit of entitlement to immunity from suit." *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988). Thus, "[i]n many cases a resolution of the substantive immunity law issues will be required in order to reach a decision on subject matter jurisdiction. . . . [A] court may have to interpret the substantive principles embodied in §§ 1605-1607 before deciding whether to take jurisdiction." *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 790-91 n.4 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *see also First Fidelity Bank v. Government of Antigua & Barbuda*, 877 F.2d 189, 195 (2d Cir. 1989) (quoting same passage).

"[S]ince entitlement of a party to immunity from suit is such a critical preliminary determination, the parties have the responsibility, and must be afforded a fair opportunity, to define issues of fact and law, and to submit evidence necessary to the resolution of the issues." *Gould*, 853 F.2d at 451. Thus, to address a motion to dismiss under Rule 12(b)(1) where the suit involves a foreign sovereign and the court's jurisdiction over the sovereign is contested, the district court must do more than just look to the pleadings to ascertain whether to grant the motion to dismiss. The district court has "considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction." *Prakash*, 727 F.2d at 1179. Further fact-finding is clearly needed in the instant case; but in making the necessary preliminary determinations the District Court should closely control and limit the discovery and fact-finding so as to avoid "frustrat[ing] the significance and benefit of . . . immunity from suit." *Gould*, 853 F.2d at 451.

E. *Application of the Section 1605(a)(2) "Commercial Activity" Exception*

Subject matter jurisdiction in a civil action against a foreign sovereign depends on whether one of the exceptions to immunity applies. *See* 28 U.S.C. § 1330(a). In the instant case, the District Court concluded that for jurisdictional purposes on the facts alleged by Foremost, Iran lacks sovereign immunity under the third clause of 28 U.S.C. § 1605(a)(2). The third clause deprives a foreign sovereign of immunity for actions based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)2). Iran contests both the classification of the acts as a "commercial activity" and the existence of any "direct effect."

1. ***Commercial Activity***

Commercial activity is defined in FSIA as

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). According to Iran, the complaint states a claim for expropriation — a governmental act, not a commercial one — and hence jurisdiction cannot obtain under the "commercial activity" exception of FSIA.

In rejecting Iran's argument, the District Court reasoned that there had been no formal declaration by the Government of Iran nationalizing Pak Dairy and that "the nature of the actions complained of by Foremost sound in the nature of a corporate dispute between majority and minority shareholders." *Foremost III*, slip op. at 9, ***reprinted in*** App. 11. According to the District Court, Foremost's "claim essentially involves allegations that Iran, acting through its various co-defendants on Pak Dairy's Board of Directors, used its majority position to lock Foremost out of the management of the company and deny Foremost its share of the company's earning in the form of dividends." *Id.* at n.12.

It seems plain that Foremost's complaint alleges actions that are both commercial and governmental in nature. It is also clear that in determining its jurisdiction the District Court may consider only those actions that are commercial in nature. *Millen Indus., Inc. v. Coordination Council for No. Am. Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988) (when a "transaction partakes of both commercial and sovereign elements," "jurisdiction will not obtain if the cause of action is based on

a sovereign activity"). But "[o]ne allegation of the complaint . . . may be sufficient to create jurisdiction." *Id.* Here, some of the alleged acts that provide the basis for Foremost's cause of action are commercial in nature, as even Iran admits. *See* Brief for Appellant at 26-27. Moreover, Iran has offered no countervailing evidence indicating that these alleged commercial acts were subsumed within a sovereign activity.

There is no indication that Iran nationalized Pak Dairy by taking it over through a process of law. Indeed, in its amended answer to the complaint, "Iran denies Pak Dairy is controlled by Iran or that it is an agency or instrumentality of Iran, as defined in 28 U.S.C. § 1603(b)." Amended Answer of Defendant Islamic Republic of Iran ¶ 11, *reprinted in* App. 124. Nor have the parties pointed to any statutory restrictions or governmental decrees or directives depriving persons outside Iran of the right to sell or transfer shares in an Iranian enterprise or of a government policy curtailing the payment of dividends. The Claims Tribunal determined that Foremost had "not proved the existence of any statutory restriction on its right to sell or otherwise dispose of its shares." *Foremost-Tehran, Inc. v. Iran*, 10 Iran-United States Claims Trib. Rep. at 250, *reprinted in* App. 78. In the absence of such countervailing evidence, the District Court properly concluded that the actions alleged were sufficiently commercial in nature to withstand Iran's motion to dismiss.[15]

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[15]Iran also argues that "[t]he *only* provision in the FSIA which denies to foreign states immunity from suit for the taking of property" is 28 U.S.C. § 1605(a)(3). Brief for Appellant at 28-29 (emphasis added). This claim finds no support in the case law, and Iran cites none. It is clear that if a proper showing is made, the appellee can rely on the "commercial activity" exception, under section 1605(a)(2), to pursue a claim against Iran.

2. *Direct Effects*

In further defense against the appellee's claim under section 1605(a)(2), Iran contends that none of the alleged acts of the sovereign had a "direct effect" in the United States. Without reaching the merits of the issue, we find no error in the District Court's determination that the facts alleged by Foremost exhibit sufficiently direct effects to confer subject matter jurisdiction under the third clause of section 1605(a)(2).

In support of its position, Iran cites *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988), in which the court held that a "direct effect" for purposes of the commercial activity exception to immunity "is one that is substantial and foreseeable," *id.* at 1514. Iran's reliance on *Zedan* is futile. In *Zedan*, this court concluded that the suffering of financial hardship in the United States from events that take place abroad is not, alone, sufficient to establish "direct effects." *See id.* at 1514, 1515. While in Saudi Arabia, Zedan — an American citizen — contracted to work for an agency of the government. He had not received the payment due under the contract at the time he returned to the United States. Zedan claimed that he suffered financial loss when the defendant-foreign sovereign failed to forward to the United States money owed him. *Id.* at 1512. The court concluded that the effects were not foreseeable. *Id.* at 1515.

Here, the effects alleged were foreseeable, substantial and direct. As to foreseeability, according to Foremost, there was a constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran to support the operation of Pak Dairy. *See* Complaint at ¶ 17, *reprinted in* App. 28. Foremost owned shares and had representation on the Board. It is hardly convincing that, with the close commercial ties alleged here, it would be "unforeseeable" that actions taken

by the Government of Iran within its borders would have effects in the United States. In *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1111 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983), this court concluded that the financial effects on the United States company were fortuitous, since it was not contemplated in the original agreement that the United States company would share in the profits. By contrast, where a Mexican bank, the foreign instrumentality, had "engaged in a regular course of business conduct with [the American purchaser of certificates of deposit] over a several-year period," the Fifth Circuit found "direct effects." *Callejo v. Bancomer, S.A.*,764 F.2d 1101, 1112 (5th Cir. 1985). In the instant case, Foremost alleges that the involvement of Foremost *was* contemplated in the original agreement and extended over a period of years.

Nor does case law support the conclusion that the effects alleged are *insubstantial* or not "direct." The alleged effects of freezing-out American corporations in their ownership of Pak Dairy are at least as substantial and direct as effects alleged in prior cases in which this court and other circuits have found direct effects." For example, the *Callejo* court determined that a foreign instrumentality-bank's breach of contract regarding payment of principal and interest on certificates of deposits had "direct effects" on their United States-resident owner within the meaning of FSIA. *Callejo*, 764 F.2d at 1110-12. In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312-13 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), the Second Circuit determined that, under either a breach of contract or breach of letters of credit theory, Nigeria's unilateral alteration of the letters of credit and cancellation of contracts had direct effects on the United States companies that were suppliers under the contracts. And in *Transamerican S.S.*, 767 F.2d at 1004, this court determined that the effects of the foreign agency's detention of an American

ship, which caused the American corporation to incur debt, and the agency's demand for payment in the United States "were both direct and substantial within the meaning of the FSIA." Adhering to this line of precedent, we find no infirmity with the District Court's determination that the alleged effects were sufficiently direct to survive Iran's motion to dismiss.

F. *Treaty of Amity*

Foremost claims that, under the Treaty of Amity, Iran waived its sovereign immunity as to suits arising out of commercial activity in which it is involved. Thus, according to Foremost, there is no jurisdictional lissue to be addressed under FSIA. We cannot agree.

Two sections of the Foreign Sovereign Immunities Act bear on consideration of the effect of the Treaty of Amity: sections 1604 and 1605(a)(1). Section 1604 of FSIA provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604. "This exception [to FSIA] applies when international agreements 'expressly conflic[t]' with the immunity provisions of the FSIA." *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683, 692 (1989). The Supreme Court found no such *express conflict* where the internaional conventions "set forth substantive rules of conduct" and did "not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Id.* Article IV of the Treaty of Amity sets forth such

substantive provisions, and hence does not pose a bar to application of FSIA.[16]

In addition, pursuant to section 1605(a)(1), if the Treaty of Amity contained an *explicit waiver* of sovereign immunity, the

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[16]Article IV of the Treaty of Amity provides, in relevant part:

> 1. Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.
>
> 2. Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of takng for the determination and payment thereof.
>
> . . .
>
> 4. Enterprises which nationals and companies of either High Contracting Party are permitted to establish or acquire, within the territories of the other High Contracting Party shall be permitted freely to conduct their activities therein, upon terms no less favorable than other enterprises of whatever nationality engaged in similar activities. Such nationals and companies shall enjoy the right to continued control and management of such enterprises; to engage attorneys, agents, accountants and other technical experts, executive personnel, interpreters and other specialized employees of their choice; and to do all the other things necessary or incidental to the effective conduct of their affairs.

Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, 8 U.S.T. 899, 903-04, art. IV (1957).

foreign state would not be entitled to immunity under FSIA. *See Amerada Hess*, 109 S. Ct. at 692; *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 333 (9th Cir.), *cert. denied*, 469 U.S. 1035 (1984). However, the only express provision for waiver of sovereign immunity under the Treaty of Amity is found in Article XI, paragraph 4:

> No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from . . . suit . . .

8 U.S.C. at 908. We agree with the Ninth Circuit that this "limited waiver" "extends only to enterprises of Iran, not Iran itself" and "extends only to enterprises 'doing business' in the United States." *Berkovitz*, 735 F.2d at 333; *see also Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209, 211 (N.D. Ill. 1982) (concluding that art. XI ¶ 4 of the Treaty of Amity waives immunity of enterprises but not of Iran itself); *Mashayekhi v. Iran*, 515 F. Supp. 41, 43 (D.D.C. 1981) (finding limited waiver of immunity in Article XI); *cf. Gibbons v. Republic of Ireland*, 532 F. Supp. 668, 672 (D.D.C. 1982) (concluding that virtually identical treaty provision waived immunity of "enterprises" including the sovereign's instrumentalities but did not waive immunity of the sovereign itself.) In the instant case, the alleged commercial actions took place in Iran not in the United States and Foremost brought the action against the sovereign itself. Thus, the provisions of Article XI, paragraph 4, are not apposite and, for the purposes of

the instant case, Iran did not waive its immunity in that treaty.[17]

G. *In Personam Jurisdiction*

In its brief to this court, Iran claims that it lacks the constitutionally mandated minimum contacts with the forum for the District Court to exercise *in personam* jurisdiction. Foremost contends that Iran has waived any claim on this matter because the issue was never raised below. We agree.

In the proceedings before the District Court, Iran's only defense resting on personal jurisdiction involved a *statutory* claim. Iran's memorandum in support of its motion to dismiss contained but one sentence regarding personal jurisdiction: "Because under the FSIA personal jurisdiction cannot exist unless there is subject-matter jurisdiction, 28 U.S.C. § 1330(b), the Court also lacks personal jurisdiction." Memorandum of Points and Authorities in Support of Motion to Dismiss and in Opposition to Motion for Partial Summary Judgment at 11 (Sept. 7, 1988) Iran mentioned an absence of "minimum contacts" only in the context of its claim that its actions in Iran had no direct effects in the United States. *See id.* at 7.

Iran may not now raise the separate constitutional ground for a claim of lack of *in personam* jurisdiction. Claims regarding defects in personal jurisdiction are waived if not raised. *See* FED. R. CIV. P. 12(g), (h); *see also Insurance Corp. of Ireland, Ltd., v. Compagnie des Bauxites deGuinee*, 456 U.S. 694, 703-07 (1982) (noting that a constitutional *in personam* jurisdiction claim is waived if not timely raised); *cf. Anger v. Revco Drug Co.*, 791 F.2d 956, 958 (D.C. Cir. 1986) (*per*

[17]We do not decide here in what contexts, if any, the Treaty of Amity might constitute a waiver of immunity. We conclude only that the treaty has not effected a waiver in the instant case.

curiam) (concluding that "the Federal Rules of Civil Procedure indicate that personal jurisdiction is a matter to be raised by motion or responsive pleading, not by the court *sua sponte*," and explaining that lack of personal jurisdiction is a threshold defense open to a party, "but subject to foreclosure absent timely objection"). It is also well settled that a party may not raise a new legal theory on appeal for the first time. *See, e.g., District of Columbia v. Air Florida, Inc.* 750 F.2d 1077, 1084 (D.C. Cir. 1984). Thus, we deny Iran's request for reversal on remand on this issue.

III. CONCLUSION

The findings of the Claims Tribunal, without more, are not sufficient to overcome the presumption of the independent status of foreign agencies, instrumentalities and states. In making the threshold jurisdictional determination, the District Court must consider whether the relationship between Pak Dairy and Iran is one of a principal to an agent. Thus, we remand to the District Court for more extensive findings on the degree of control exerted by Iran over Pak Dairy and over the shareholder entities that Foremost alleges are government controlled. For the reasons set forth in this opinion, we affirm the District Court's determinations with respect to all the other issues raised in this appeal.

It is so ordered.

IRAN STAMP ILLEGIBLE
IRAN UNITED STATES
CLAIMS TRIBUNAL
FILED 11 APR 1986

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APPENDIX G

IRAN-UNITED STATES CLAIMS TRIBUNAL

CASE NOS. 37 and 231
CHAMBER ONE
AWARD NO. 220-37/231-1

Case No. 37

FOREMOST TEHRAN, INC., FOREMOST SHIR, INC., FOREMOST IRAN CORP., FOREMOST FOODS, INC., FOREMOST-McKESSON, INC., OVERSEAS PRIVATE INVESTMENT CORPORATION,

Claimants,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, THE MINISTRY OF ECONOMIC AFFAIRS AND FINANCE, FINANCIAL ORGANISATION FOR THE EXPANSION OF OWNERSHIP OF INDUSTRIAL UNITS, NATIONAL INVESTMENT COMPANY OF IRAN, INDUSTRIES AND MINES BANK (as successor to INDUSTRIAL AND MINING DEVELOPMENT BANK OF IRAN), FOUNDATION FOR THE OPPRESSED, SHERKAT SAHAMI LABANIAT PASTEURIZE PAK,

Respondents.

Case No. 231

FOREMOST TEHRAN, INC., FOREMOST SHIR, INC., FOREMOST IRAN CORP., FOREMOST FOODS, INC., FOREMOST-MCKESSON, INC.,

Claimants,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, THE MINISTRY OF ECONOMIC AFFAIRS AND FINANCE, FINANCIAL ORGANISATION FOR THE EXPANSION OF OWNERSHIP OF INDUSTRIAL UNITS, NATIONAL INVESTMENT COMPANY OF IRAN, INDUSTRIES AND MINES BANK (as successor to INDUSTRIAL AND MINING DEVELOPMENT BANK OF IRAN), FOUNDATION FOR THE OPPRESSED, BANK MARKAZI IRAN, SHERKAT SAHAMI LABANIAT PASTEURIZE PAK,

Respondents.

AWARD

Appearances:

For the Claimants:
Mr. Mark R. Joelson
Ms. Sydney Kase
Mr. Leonard van Sandick
Attorneys
Mr. Richard Stern
Attorney for OPIC
Mr. Sabin Phelps
Mr. Leonard M. Patterson
Representatives of
Foremost-McKesson, Inc.

For the Respondents:
Mr. Mohammad K. Eshragh
Agent of the Government of
the Islamic Republic of Iran
Mr. Ali Akbar Riazi
Legal Adviser to the Agent
Mr. Mohsen Karbasi
Representative of Pak Dairy
Mr. Yahya Alizadeh
Mr. Ali Akbar Salehi
Legal Advisers to Pak Dairy

Mr. Reza Aghilabadi
Assistant to Representative
of Pak Dairy

Also present: Mr. John Reynolds
Legal Adviser to the Agent
of the Government of the
United States of America

I. *Facts and contentions*

a) *The procedural history*

This Award decides two separate Cases. The major element of the claims in both Cases relates to alleged expropriation of shares held by affiliated United States Corporations in a dairy company in Iran. A portion of these investments was insured agains the risk of expropriation. One of the Cases, No. 37, relates to the insured portion of the claims, and the insurer is included as a party. The other Case, No. 231, involves uninsured portions of the expropriation claim, and the insurer is not a party. The second Case also includes claims for certain alleged breaches of contract, as to which there was no insurance.

In view of the similarity of the underlying facts and issues, and the circumstance that most of the Parties appear in both Cases, the hearing of the two Cases was co-ordinated. See Internal Guidelines of the Tribunal, para. 1, *reprinted in* 1 Iran-U.S. C.T.R. 98. The hearing of both Cases took place on 14 and 15 December 1983, and they are now made the subject of a single Award.

(i) Case No. 37

On 16 November 1981 the Statement of Claim in Case No. 37 was filed with the Tribunal by Foremost Tehran, Inc., Foremost Shir, Inc., Foremost Iran Corporation, Foremost Foods, Inc, Foremost-McKesson, Inc. (hereinafter collectively referred to as "Foremost"), and Overseas Private Investment Corporation ("OPIC"). The Claimants allege expropriation of the 31% equity interest held by certain of the Foremost companies in Sherkat Sahami Labaniat Pasteurize Pak ("Pak Dairy"), an Iranian joint stock company. This claim seeks damages of $7,040,000, as compensation for the insured portion of the unpaid dividends. The Claimants seek interest on these claims.

OPIC is an agency of the United States Government engaged in the business of insuring the overseas investments of United States nationals. It was named as a Claimant in Case No. 37 in exercise of its rights under assignment clauses, described below, contained in two settlement agreements, dated 29 July 1980 and 3 August 1981, whereby it had paid compensation to Foremost under insurance contracts relating to Foremost's investment in Pak Dairy.

The Respondents to the claim are the Government of the Islamic Republic of Iran, the Ministry of Economic Affairs and Finance, the Financial Organisation for the Expansion of Ownership of Industrial Units ("Financial Organisation"), National Investment Company of Iran ("NICI"), Industries and Mines Bank ("IMB")[1], the Foundation for the Oppressed, and Pak Dairy, which entities the Claimants seek to hold jointly and severally liable.

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[1]Successor to Industrial and Mining Development Bank of Iran ("IMDBI") and certain other banks.

ii) *Case No. 231*

The second Case, No. 231, was filed on 12 January 1982. The Claimants are the same Foremost companies as in Case No. 37, but here OPIC is not a party. The Respondents are identical to those in Case No. 37, with the addition of Bank Markazi Iran. The claim consists of three parts. Part I, the major element, relies on the same factual allegations which form the basis of the claims in Case No. 37. Foremost seeks compensation amounting to $3,960,000 for the uninsured 36% of its allegedly expropriated 31% interest in Pak Dairy. Compensation of $325,021 is sought for the uninsured 36% portion of the two unpaid dividends. Foremost seeks to hold the Respondents jointly and severally liable. Foremost seeks interest on these claims.

Part II of the claim alleges breaches of four contracts under which Pak Dairy leased milk carton filling machines. Two of the machines were leased by Foremost Foods, formerly known as International Dairy Engineering Company, and two by Foremost-McKesson. These two corporations are the only Claimants with respect to this part of the Case. Under alternative calculations of damages, the Claimants seek unpaid monthly rentals and the value of the machines, which Pak Dairy has retained. First, they suggest awarding unpaid rentals to the date the machines are paid for, as well as the value of the machines. Alternatively, they suggest applying the rule of *Raygo Wagner Equipment Co.* and *Star Line Iran Co.*, Award No. 20-17-3 (15 December 1982), ***reprinted in*** 1 Iran-U.S. C.T.R. 411, by awarding unpaid rentals to the date, 5 December 1980, on which Pak Dairy, in response to Foremost's demand, should have returned the machines, as well as their value. The Claimants seek interest on the amounts awarded under either calculation.

Part III of the claim alleges breach of a Technical Assistance Agreement ("TAA") between Pak Dairy and Foremost-

McKesson, which is the sole Claimant in this respect. It seeks a total of $157,013.70, together with interest, in respect of unpaid invoices, trademark licenses, fees and other amounts allegedly due under the TAA.

Parts II and III are directed against both Pak Dairy and the other Respondents, whom Foremost alleges interfered with its contractual rights to receive payment from the company.

b) *Contentions of the Parties*

i) *Jurisdiction*

The Repondents raise a number of jurisdictional objections. As to both Case Nos. 37 and 231, they first argue that Foremost-McKesson held no shares in Pak Dairy, and thus cannot be a Claimant in its own right in the claim based on expropriation. The Respondents point out that, as to the same claim, Foremost Foods is named as a Claimant only in respect of 1% of shares which are entered in the registration book of the company in the name of Frank Fisher, a Foremost representative who served on the Pak Dairy board of directors. Moreover, they dispute that Foremost Foods can claim with respect to shares so registered in the name of Mr. Fisher. In this connection, they argue that Article 40 of the Commercial Code of Iran makes registration of ownership conclusive, so that even were there an agreement between Mr. Fisher and Foremost Foods, it could not be enforced against the company or a third party.

Next, as to Case No. 37, the Respondents argue that legal title to the claim is now vested in OPIC, and thus the Foremost companies have no *locus standi*. They argue as well that OPIC only acquired its rights to a portion of its claim in August 1981, when the second of the two settlement agreements was signed, and thus was not the owner of that portion of the claim

on 19 January 1981.[2] Moreover, they contend that OPIC, a government agency, is not a national of the United States within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration. Thus, it could only bring a claim "arising out of contractual arrangements between [Iran and the United States] for the purchase and sale of goods and services" as provided in Article II, paragraph 2, which this claim, for expropriation, clearly is not.

In addition, the Respondents contend that since Foremost has received full compensation from OPIC, it no longer has a claim. They also object, as an evidentiary matter, to the deletion of the figures showing the amounts paid by OPIC from the copies of the two settlement agreements filed with the Tribunal.

Describing itself as a private corporation, Pak Dairy argues that it cannot be an "entity controlled by the Government of Iran . . . " within the meaning of Article VII, paragraph 3 of the Claims Settlement Declaration. Thus, in its view, it does not fall within the Tribunal's jurisdiction. NICI and the Foundation for the Oppressed likewise deny that they are controlled entities over which the Tribunal may assert jurisdiction.

Finally, the Respondents argue that the Law Concerning the Attraction and Protection of Foreign Investment, pursuant to which a certificate of approval was issued for Foremost's investment in Iran, provides a dispute settlement procedure which excludes the Tribunal's jurisdiction pursuant to Article II, paragraph 1 of the Claims Settlement Declaration.

The Claimants suggest that neither Foremost-McKesson nor OPIC is a necessary party to the claim in Case No. 37.

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[2]A claim must have been "outstanding" on 19 January 1981 to fall within the jurisdiction of the Tribunal. *See* Claims Settlement Declaration, Article II, paragraph 1.

They acknowledge that Foremost-McKesson itself held no shares in Pak Dairy, but explain that it was included as a Claimant because it is the 100% owner of the other Foremost companies and the named party to the two settlement agreements with OPIC. In the Claimant's view, because OPIC has only a limited beneficial interest, it could have permitted Foremost to pursue the claim as its continuous legal owner, and to recover from Foremost later. Accordingly, they are prepared to dispense with OPIC as a Claimant. In any event, the Claimants assert that the amounts paid by OPIC in settlement of Foremost's insurance claim are irrelevant to any issues in this proceeding.

The Claimants contend that Pak Dairy is a controlled entity within the meaning of Article VII, paragraph 3, by virtue of the ownership by other controlled entities of a majority of the company's shares and the representation of controlled entities through a majority of the members of the board of directors. Specifically, the Claimants allege that the Financial Organisation, NICI, IMB, National Iranian Banks Investment Company ("NIBIC") and the Foundation for the Oppressed are government-controlled and that they hold shares in Pak Dairy collectively amounting to 52% and hence constituting a controlling interest.

Finally, the Claimants point out that the dispute settlement procedure of the Law Concerning the Attraction and Protectin of Foreign Investment is not a "binding contract" which would bring the exclusionary provision of Article II, paragraph 1, into play, and that their expropriation claim is not based on any "special legislation" as contemplated by that law.

ii) *The merits*

In 1959 the Foremost group of companies participated in the establishment of Pak Dairy in Iran, initially owning a 50%

equity interest. By separate agreements, they provided technical assistance and tradmark licensing. The equity interest held by Foremost varied subsequently, rising at one point to 86%, but later becoming considerably less as the result of a number of sales. It is uncontested that, at the end of the fiscal year 1979, Foremost held 30%, while, as noted above, there is a dispute whether Foremost owned an additional 1% registered in the name of Frank Fisher. Of the shares on which Foremost bases its claims, 10% were registered in the name of Foremost Tehran, 10% in the name of Foremost Shir, 10% in the name of Foremost Iran, and 1% in the name of Mr. Fisher. Foremost Foods is the 100% owner of each of these Foremost companies. Foremost Foods is, in turn, a wholly-owned subsidiary of the remaining Claimant, Foremost-McKesson.

Foremost claims to have played a major role in the management of Pak Dairy, having provided management skills and personnel, including participation on the board of directors.

Foremost alleges that starting in late 1978 and acting in concert, the Iranian governmental entities with shares in Pak Dairy implemented a series of decisions which effectively deprived it of the use and benefit of its 31% interest in the company. Specifically, Foremost alleges first that the climate of hostility toward United States nationals forced its expatriate personnel in Iran, including Mr. Fisher, Pak Dairy's managing director until November 1979, and Mr. Loichinger, the chief engineer, to leave the country at the end of 1978. According to Foremost, the prevailing circumstances prevented Mr. Loichinger's return altogether, while Mr. Fisher, who visited Iran three times during 1979, found it impossible safely to return there after his final departure on 1 November 1979. The forced absence of Foremost personnel severely hampered its ability to preserve the value of its investment. Second,

Foremost alleges that although Pak Dairy declared cash dividends in 1979, 1980 and 1981, in each case based on profits earned in the prior year, and paid those dividends to Iranian stockholders, it refused to pay them to Foremost pursuant to a decision by the Pak Dairy board of directors not to pay any money for any reason to foreign shareholders. Similarly, Pak Dairy declared stock dividends in 1979 and 1980 which were distributed to all Iranian shareholders, but Foremost received only the 1979 stock dividend, not the one declared in 1980. Third, Foremost alleges that in November 1980 government representatives ousted Mr. Fisher, one of Foremost's two representatives, from the Pak Dairy board of directors. At the same time, by improperly rejecting the two shareholder proxies held by Mr. Vahdati, Foremost's remaining representative, government representatives also managed to prevent Foremost from electing a replacement to Mr. Fisher, thus depriving Foremost of the representation to which the cumulative voting provision of the Iranian Commercial Code entitled it. Fourth, Foremost alleges that Dr. Mohsen Ameli, the government-employed chairman of Pak Dairy's board, instructed Mr. Asghari, Mr. Fisher's replacement as managing director, to cease sending accounts, financial statements or other information to United States citizens or translating such material into English as had been the practice. Finally, Foremost cites as contribution to expropriation Pak Dairy's failure to pay rentals and other sums due under the agreements which underlie Parts II and III of Case No. 231.

According to Foremost, the cumulative effect of these actions rose to the level of expropriation on 27 May 1980, the date on which Mr. Asghari sent a telex to Foremost informing it of the decision of the board of directors to make no payments to foreign shareholders. Foremost claims that on that date the going-concern value of its 31% equity holding

was $11 million. It relies on a valuation report prepared by Standard Research Consultants ("SRC"). At the hearing, SRC's representative, Mr. Kenneth McGraw, gave evidence concerning comparative company analysis, the method of valuation SRC had employed, and discussed the factors he had taken into account.

The Respondents deny that Pak Dairy was government-controlled, or that the Respondent entities which held shares used their rights as shareholders as a means to implement government policy. Pak Dairy contends that at least one-half of the shares which the Claimaints count as the Financial Organisation's are in fact registered in the names of individual farmers and workers, to whom it is the Organisation's objective to transfer ownership. According to Pak Dairy, while the Financial Organisation votes these shares, it does so only pursuant to a purchase/agency agreement which places ownership in the hands of the individuals, but leaves voting rights in the hands of the Financial Organisation while the purchase price of the shares remain unpaid. Pak Dairy states that, in the years ending December 1979 and December 1980, Iranian firms, bank and companies held 41%, foreign companies held 30% and natural persons, including the farmers and workers, held 29%.

The Respondents further deny that there has been any interference with the rights of Foremost as a shareholder, or any expropriation of its interest. A finding of expropriation, the Respondents contend, would require a specific decree or legislative act, neither of which is present in this Case. The Respondents emphasize the distinction between majority share ownership by individual government entities — which, they contend, does not essentially alter the private character of the company — and expropriation. They allege that Pak Dairy remains an independent private corporation, and they

characterize the dispute as one arising from minority shareholders' dissatisfaction with the majority shareholders' exercise of their legitimate management rights. In the Respondents' view, such grievances should be brought before the courts of Iran.

Turning to Foremost's specific allegations of interference, Pak Dairy denies that any of Foremost's personnel were expelled from management. In the case of Mr. Fisher, he remained in contact with Pak Dairy after his departure in November 1979. Pak Dairy contends that there were no irregularities in the conduct of board meetings, and that the form of proxy which was ruled unacceptable for the shareholders' meeting of 16 November 1980 was correctly ruled invalid, as it had not been properly certified and had been given only in relation to a meeting scheduled for 11 October 1980. Foremost's participation on the Board ended only when it withdrew its representatives by telex on 23 October 1981 and declined to replace them.

Pak Dairy argues that all shareholders were treated alike in the dissemination of corporate reports and notices, and that Foremost was not entitled to any special privileges in this regard. Information was, it contends, being made available to Foremost as late as September 1981. With regard to the payment of dividends, Pak Dairy acknowledges that it was obliged to pay in Rials, but contends that there was no requirement to convert the dividend payments into Dollars. The telex sent by Mr. Asghari on 27 May 1980, stating that no further payments could be made to foreign shareholders, was unauthorised and had been superseded by statements by Pak Dairy of its willingness to make any rental and dividend payments it owed.

Pak Dairy disputes Foremost's proposed valuation of its holding, contending that SRC's method was chosen as the one

likely to yield the highest, though not the most accurate, results. Pak Dairy complains that it takes no account of subsidy levels and uses auditing reports which do not include necessary reserves. Pak Dairy submitted, in the form of a post-hearing memorial, a report by Mr. Khatami of Separ Auditing and Management Services which proposes alternative methods of valuation.

As to the machine rental claims, Pak Dairy contends that the underlying contracts were "imposed" and "one-sided", and that, to the extent that rental is claimed for the period after 19 January 1981, it is excluded from the Tribunal's jurisdiction. It has expressed its willingness to pay, in Rials, rentals for a five-year period on the basis of the company's books. It agrees to pay a fair price for the machines, but does not accept Foremost's estimation of their current value, which it contends should be assessed by an expert. As to the amounts due under the TAA, Pak Dairy does not dispute that it has to pay amounts reflected on its own books.

The Ministry of Economic Affairs and Finance, NICI, the Foundation for the Oppressed, the Financial Organisation, IMB and Bank Markazi Iran each deny that the claims are attributable to them.

All Parties have asked for costs.

III. *Reasons for Award*

a) *Procedure*

The Respondents have requested that certain documents included in the Claimants' submissions of documentary evidence be excluded. Since no valid grounds for such exclusion have been presented, the Tribunal admits all such documents.

Having regard to the the Tribunal's holding, set forth below, on the claim for expropriation, the Tribunal finds no need to rule on the Respondents' objection to the deletion of the amounts paid by OPIC from the copies of the two settlement agreements filed.

b) *Jurisdiction*

i) *The Claimants*

It is no longer disputed by the Respondents that the Foremost companies are nationals of the United States of America as defined by Article VII, paragraph 1 of the Claims Settlement Declaration.

As has been seen above, the Claimants have expressed the view that OPIC is not a necessary party to Case No. 37 and can be dismissed as Claimant, as the claim is legally vested in Foremost and can properly be brought by it alone. The Respondents argue that, because Foremost was compensated by OPIC for its alleged losses pursuant to the the two settlement agreements of 29 July 1980 and 3 August 1981, it no longer has a claim for expropriation to bring before the Tribunal. They contend that, insofar as a claim exists, it is vested in OPIC.

An examination of the terms of the settlement agreements leads the Tribunal to a different conclusion. The first settlement agreement, dated 29 July 1980, relates to Foremost's share of the dividend declared by Pak Dairy in 1979. It provides for the transfer by Foremost of its "entire beneficial interest" in the insured dividend. At the same time, however, Foremost retained the legal title to the claim, and with it, the right and duty to institute proceedings for recovery in its own name. The second agreement, dated 3 August 1981, relates to the dividend declared in 1980 as well as to Foremost's en-

tire equity interest in Pak Dairy. It, too, contains an assignment to OPIC of "a beneficial interest" in, inter alia, "any claims, causes of action or other rights of Foremost" existing in connection with the assets allegedly expropriated. It goes on to provide,

> "Foremost shall retain and use its best efforts to maintain the legal title in and to all of the aforesaid items for the benefit of and in trust for OPIC, except as otherwise provided below."

It follows that Foremost is legally entitled to pursue a claim for recovery of the insured portion of its losses as well as the uninsured portion. Legal title to the entire claim was vested continuously in Foremost from the date the claim arose to 19 January 1981 and remained so thereafter, notwithstanding the intervening settlements with OPIC. This being so, the recovery by Foremost of a measure of compensation from its insurers cannot affect its title to claim against the present Respondents.

This result appears to be entirely consistent with the governing law of the settlement agreements, that of the District of Columbia, which, like other common law systems, provides that an insured party who assigns a limited beneficial interest to its insurer is the proper party to bring a claim for compensation for the entire loss.[3]

In view of the foregoing, and having regard to the Claimants' statement that OPIC is not a necessary party and can be dismissed, OPIC is stricken as a Claimant in Case No. 37. Likewise, Foremost-McKesson, which was not itself a shareholder in Pak Dairy, but which was named as a party

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[3]*See, e.g.*, American Law Institute, *Restatement (Second) of Trusts* §280 (1959); *Stanley v. Colt*, 72 U.S. (5 Wall.) 119, 168 (1867); *Mobile and Montgomery Railway Co. v. Jurey and Gillis*, 111 U.S. 584 (1883).

to the settlement agreements with OPIC, is also stricken as a Claimant in Case No. 37.

Another preliminary issue is whether Foremost held only 30% of the shares of Pak Dairy, or whether it held 31%. The latter figure includes not only the holdings entered in Pak Dairy's registration book in the names of three Foremost companies, but also a block of 910 shares registered in the name of Frank Fisher. The Respondents argue that the entry in Pak Dairy's registration book of the disputed block of 910 shares, constituting 1% of Pak Dairy's outstanding stock, in Frank Fisher's name, precludes Foremost from asserting ownership of them. They rely on Article 40 of the Iranian Commercial Code, which they read to make nominal registration conclusive.

In the present Cases, however, there is abundant evidence that Pak Dairy knew — and acted in accordance with its knowledge — that apart from the 161 shares that Mr. Fisher held in his own right, he held the disputed block of 910 shares as nominee of Foremost Foods. First, Pak Dairy's own list of shareholders separately records the two blocks of shares held by Mr. Fisher. Second, a letter written by Mr. Fisher on 3 July 1979 in his capacity as managing director of Pak Dairy to the Ministry of Economic Affairs and Finance request that permission be granted Pak Dairy to transfer to Foremost the dollar equivalent of 31% of the dividend declared in 1979. Third, an auditor's report reflecting Pak Dairy's 1979 income taxes appears to show that the proposed dividends on Mr. Fisher's blocks of shares were taxed at different rates — treatment consistent with different ownership. Fourth, Foremost stated at the hearing that the usual practise was that Foremost receive a single dividend check for the entire 31%.

Moreover, the particular circumstances of this Case would make a contrary result both inequitable and illogical. First, in an affidavit submitted in support of Foremost's claim here,

Mr. Fisher, the only other possible owner of the disputed block, states that Foremost owned 31% of the shares in Pak Dairy. Second, Foremost stated at the hearing that Mr. Fisher had signed and delivered to Foremost an undated "stock power" that authorized Foremost to transfer ownership of the 910 shares into its own name at any time. Third, in Case No. 10755, to which Pak Dairy refers, and which arises from the same nucleus of facts as the present Cases, Mr. Fisher has submitted a statement of Claim, in which he asserts ownership only of the block of 161 shares which both he and Foremost have consistently stated was the extent of his personal holding in the company. Taking account of all these considerations, the Tribunal concludes that, as a matter of equity and for the purposes of the present Cases, Foremost Foods must be regarded as the true owner of the 1% of Pak Dairy's shares registered in the name of Mr. Fisher. Foremost is therefore entitled to make its claim in respect of all 31%.

ii) *The Respondents*

As to the Tribunal's jurisdiction over the respondent entities, it is not disputed that Bank Markazi Iran falls within the definition of "Iran" in Article VII, paragraph 3 of the Claims Settlement Declaration. The Tribunal has previously held that the Foundation for the Oppressed, likewise, is an instrumentality controlled by the Government of the Islamic Republic of Iran and is thus within the Tribunal's jurisdiciton. *See* Award No. ITL 54-134-1 of 17 September 1985 in *Hyatt International Corporation et al.* and *The Government of the Islamic Republic of Iran et al.* at pp. 23-31.

As to the remaining Respondents, the Financial Organisation has not denied that it falls within the prescribed definition, and the record contains compelling evidence that it is a governmental entity. Its Charter, enacted by the Iranian

parliament, indicates that it is affiliated to the Ministry of Economic Affairs and Finance, and the Minister serves as Chairman of its General Assembly. Further, the correspondence filed as exhibits to Pak Dairy's post-hearing memorial indicates that a distinction was drawn for tax purposes between shares in Pak Dairy held by the Financial Organisation as nominee for various farmers and workers, and shares owned directly by the Financial Organisation itself, which was "government-owned.". The Tribunal therefore finds that it has jurisdiction over the Financial Organisation.

NICI has denied that it falls within the definition of "Iran" in Article VII, paragraph 3, of the Claims Settlement Declaration. However, it has not adduced any evidence to support this position while there is considerable evidence to the contrary. NICI was established as a joint stock company in 1975, apparently pursuant to legislation designed to encourage investment in productive units. Its founding shareholders were four banks and two insurance companies. All banks in Iran were nationalised by the Law of Nationalization of Banks of 7 June 1979, and all insurance companies by the Law of Nationalization of Insurance Companies of 25 June 1979. A list of the members of NICI's board of nine directors shows the same four banks and two insurance companies, together with three private individuals. The Tribunal therefore concludes that it has jurisdiction over this Respondent.

IMB is likewise under government control by virtue of the nationalisation of all banks in June 1979.

A list of the shareholders of Pak Dairy at the end of 1979 shows that 10% of the shares were held in the name of NIBIC. It is not disputed that IMB, NIBIC's largest shareholder, took control of its affairs in about June 1979. Therefore NIBIC must be held to have been under the ultimate control of the Government.

Pak Dairy is itself named as a Respondent in these Cases. The question whether a corporation is controlled by the Government of Iran for jurisdictional purposes is distinct from that of whether the corporation or any of its shares have been expropriated. Although the relevant evidence may be largely coextensive, different considerations apply to its evaluation.

The two main indicators of government control of a corporation are the identity of its shareholders and the composition and behaviour of its board of directors, which must be examined together. A list of Pak Dairy's shareholders as of December 1979 and December 1980, extracted by Pak Dairy from the annual reports of its auditors, indicates that IMB held 3.6% fo Pak Dairy's shares, NIBIC 10%, NICI 8.3%, the Foundation for the Oppressed 9.5%, and the Financial Organisation 9.6% in its own name. Thus, controlled entities directly owned 41% of Pak Dairy's shares.

A further 11% of the shares were held in the name of workers and farmers who had purchased them from the Financial Organisation. It is therefore necessary to determine whether the rights in respect of those shares were, for practical purposes, exercised by the Financial Organisation. The shares were registered in the names of the workers and farmers to whom they had been transferred during the period 1974 to 1978 pursuant to the Wider Share Ownership Law. However, the Financial Organisation, which had loaned the purchase price in each case, retained the right under the individual purchase agreements to vote the shares as "undismissable attorney" and to apply the dividends accruing to them, for as long as it took to amortize the purchaser's debt. Only those purchasers who had paid cash retained the right to vote their shares, but it appears that only an insignificant number had so paid. The Tribunal therefore concludes that this 11% block of Pak Dairy's shares was, in effect, under the

control of the Financial Organisation, thus bringing the total holding in the hands of governmental organisations to approximatley 52%.

Even were majority shareholding not conclusive as to control, it is clear that by some time in 1980, controlled entities occupied a majority of the seven seats on the board of directors and dominated its affairs. For example, the minutes of an "Ordinary General Meeting in Extra-Ordinary Manner" held on 16 November 1980 record a decision that from that time the board would consist of Dr. Ameli and Mr. Karbasi, both of the Financial Organisation; Mr. Vahdati of Foremost Shir; two representatives of NIBIC; and one representative each from IBM and the Foundation for the Oppressed. Thus, six of the seven seats were government-controlled. In conjunction, majority share ownership and control of the board establish that Pak Dairy is an "entity controlled by the Government of Iran" within the meaning of Article VII, paragraph 3, of the Claims Settlement Declaration. It is thus a proper Respondent to the claims of Foremost presently before the Tribunal.

iii) *The forum selection clause*

A further jurisdictional issue is whether the dispute settlement procedure laid down by the Law Concerning the Attraction and Protection of Foreign Investments in Iran ("LAPFI"), enacted in 1955, operates, as the Respondents argue, to exclude the jurisdiction of the Tribunal pursuant to Article II, paragraph 1 of the Claims Settlement Declaration, which excludes

> "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position".

Article III of LAPFI, in turn, provides that capital imported into Iran in accordance with its provisions "shall be subject to the legal protection of the Government". The same Article guarantees "fair compensation" where the owner is deprived of his capital by "special legislation". It also provides that "[i]n case of disputes, investigation of claims for fair compensation guaranteed by the Government shall be undertaken by competent Iranian courts".

In the Tribunal's view, the Respondents' contention must fail. The claim before the Tribunal is one for expropriation, but it is based on allegations of a series of governmental measures rising eventually to the level of a taking. There is no allegation of any "special legislation" which deprived Foremost of its property rights. Further, the expropriation claims before the Tribunal are brought by all four Foremost companies holding shares in Pak Dairy.

The Ministry of Commerce approval granted pursuant to LAPFI for the initial investment was granted in the sole name of International Dairy Engineering Company, which subsequently changed its name to Foremost Foods. The portions of the claim belonging to the other three companies would thus be outside the scope of the LAPFI dispute settlement provision in any event.

c) *The merits*

i) *The expropriation claim*

Foremost claims that its 31% holding in Pak Dairy was expropriated by the actions of the Government and its agencies. It argues that the taking was accomplished by 27 May 1980, the date of the telex from Mr. Asghari stating that no payments could be made to foreign shareholders.

It is well settled, in this Tribunal's practice as elsewhere, that property may be taken under international law through interference by a state in the use of that property or with the enjoyment of its benefits. This remains true in the absence of a formal expropriatory decree, even where the formal legal title to the property is not affected. In its Award in *Starrett Housing Corporation et. al.* and *The Government of the Islamic Republic of Iran et al.*, the Tribunal observed that

> "it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the States does not purport to have expropriated them and the legal title to the property formally remains with the original owner."[4]

Foremost claims that the expropriation of its interest was the cumulative result of a number of instances of interference with the exercise of its rights as shareholder. It identifies these, specifically, as the expulsion of Foremost's expatriate personnel from Iran, the refusal to pay dividends to Foremost since 1979, the ouster of Mr. Fisher from the board of directors and the interference with the provision of basic information to Foremost. Thus the question for the Tribunal is whether the combined effect of these alleged acts or omissions, or, indeed, the impact of any one of them, was sufficient to deprive Foremost of its fundamental rights as owner of 31% of Pak Dairy's shares.

Foremost's claim must be examined in the light of the history of its investment in Pak Dairy and its participation in the management of that company as well as of the subsequent

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[4]Award No. ITL 32-24-1 of 19 December 1983, *reprinted in* 4 Iran-U.S. C.T.R. 122, 154.

developments which took place. The original investment was made in 1959, and the level of Foremost's shareholding subsequently fluctuated, as has previously been seen. Mr. Fisher related in his affidavit that Foremost's holding had already been reduced in 1976 from 51% to a minority interest of 31%. It thereby lost the right to nominate the managing director, although Mr. Fisher continued to hold this office until his departure from Iran in November 1979. His successor, Mr. Asghari, who held office until September 1980, was a board member who had previously represented a private shareholder, Technisaz Company.

A comparison of the shareholders in 1976 with those listed at the end of 1979 reveals that even in 1976, government participation was prominent, with 30% of the shares in Pak Dairy already owned by government entities. The Financial Organisation held 21%, and NICI held 9%. A significant change in the balance of ownership took place after June 1979, however, when various private shareholdings came into the hands of government-controlled entities, bringing the level of holdings by such entities to approximately 52%.

It was not until October 1979 that the Financial Organisation began to exercise a leading role in Pak Dairy's affairs. Its two representatives, Dr. Ameli and Mr. Karbasi, were elected to the board of directors on 14 October 1979, and from that point on, a strong and inexorable shift can be traced in the attitudes of the board of directors, which inclined more and more towards the implementation of the policies of the new government. Up to that point Foremost had continued to enjoy a position of significant influence in the company's affairs, even after it ceased to have a majority shareholding, by virtue of its contribution of technical and managment expertise over several years as well as the influence of Mr. Fisher in his role as managing director. However, Foremost's influence began to erode from that date.

Foremost's holding did not at that time entitle it to appoint the managing director. After Mr. Fisher resigned from that office in November 1979, Mr. Asghari, a colleague of long standing, was appointed to succeed him as managing director at a board meeting held on 15 November 1979, when the board accepted Mr. Fisher's resignation "after thanking him for his efforts during several years in office". Foremost maintained its two places on the board in the person of Mr. Fisher, who appointed a proxy, and Mr. Neil Dinaut, who represented Foremost Shir. The minutes of that meeting record that Dr. Ameli appended a note urging that all "foreign contracts" entered into by Pak Dairy should be "reconsidered" and that no further payments should be made in respect of them.

There followed a board meeting on 17 February 1980, held at the offices of the Financial Organisation and chaired by Mr. Haghshenas of IMDBI. The object of the meeting was to discuss the year's accounts and decide on the distribution of the company's profits. On behalf of the Financial Organisation, Dr. Ameli proposed that "the minimum amount of the legal dividend be paid to the shareholders and the balance be appropriated for the purpose of creating a reserve fund for severance pay" for the company's workers. The proposal as to severance pay was based on the recommendation of Pak Dairy's auditor, and it was extensively debated at the meeting. Mr. Vandati, who by now was serving as proxy for both Foremost directors, was absent from the meeting. He was, however, present when the discussion was resumed at the next meeting, held at Dr. Ameli's office on 10 March 1980, again under the chairmanship of Mr. Haghshenas. A decision was taken at that meeting to set up the severance pay reserve fund. In the ensuing discussion about dividends, the minutes state that

> "the representatives of the Financial Organization . . . expressed their opinion that the minimum dividend should be divided among the shareholders; that the balance [of the profit] be credited to the company's reserve fund and that no stock dividend be issued. Their reason for this action was the presence of foreign shareholders in the company. By this action, they wanted to hold the amount paid to the foreigners to the minimum."

One of the factors taken into consideration in arriving at the dividend was that

> "the profits made by the company under current laws and regulations belong to the company and, the shareholders have a right thereto in proportion to their capital investment, therefore, whether there is a distribution in cash, or a stock dividend, or a reservation of a portion as undivided profit, it will not in principle change the rights of the shareholders to the profits earned; especially because due to the existing dispute between the governments of Iran and the United States, *the payment of profits to the foreign shareholders has been suspended for the time being*" (emphasis added).

A dividend of eighteen percent of the profit in cash and ten percent in stock was declared on 15 April 1980.

The next development of significance occurred when Foremost wrote a letter to Mr. Asghari on 21 May 1980 requesting that the amount of the dividend payable to the Foremost companies, 29,865,280 Rials, be placed in a separate bank account to be opened in the name of Foremost-McKesson. Mr. Asghari replied by telex dated 27 May 1980 in the following terms:

> "I have to inform you that due to decision and instruction of the board of directors, Pak Dairy can not pay any sums of money for any reason to foreign share holders. So I cannot take any action regarding your request."

Foremost's request for written confirmation of this decision met with no response. Despite Pak Dairy's assertion in its pleadings that the telex was unauthorized, it was in fact never specifically retracted. However, in telexes dated 28 September 1981 and 11 November 1981 Pak Dairy stated its readiness to pay, in Rials, the dividends which it said had been credited to Foremost in Pak Dairy's books.

An appraisal of the situation prevailing at 27 May 1980, the date on which Foremost asserts that the actions of Pak Dairy's governmental shareholders crystallised into a taking, reveals that two years' dividend, one of which had been declared only one month previously, had not been paid. However, Foremost still owned 31% of the shares; it still held two seats on the board of directors; and it continued to exercise its right in this respect through the participation of Mr. Vahdati. It could not, as a minority shareholder, have expected successfully to oppose the trend on the part of the majority towards the adoption of policies in line with those of the new revolutionary Government. The only action of the majority which was demonstrably directed against Foremost's interest, and which must be considered to engage the responsibility of the Government, was the withholding of the dividend payments. However, while constituting an undoubted interference with Foremost's rights, this in itself could not be interpreted as amounting to an expropriation of Foremost's interest when set against the background of Foremost's continued, albeit circumscribed, participation in the affairs of the company.

As at May 1980, Foremost still had two seats on the board of directors and was continuing to exercise its rights in that respect without apparently encountering any interference.

Certain critical changes occurred at a later date, however, notably at the general meeting of shareholders on 16 November 1980, discussed above in the context of governmental control over Pak Dairy. The two proxies held by Mr. Vahdati were found not be be formally valid for the purpose of that meeting. More significantly, at the suggestion of the representative of the Foundation for the Oppressed, Mr. Fisher was voted off the board of directors by "the majority vote of the shareholders present at the meeting", and both Mr. Haghshenas and Mr. Asghari resigned. The general meeting then expressed its gratitude for the services of Mr. Fisher. The three were replaced by directors representing the Foundation for the Oppressed, IMB and NICI. The election was "by the unanimous vote of the shareholders present at the meeting". The minutes of the meeting confirm that Foremost Shir still held one seat on the board, occupied by Mr. Vahdati. At that meeting Dr. Ameli stated that

> "the main objective [of the company] is . . . to protect the interests of the country as well as to preserve the industry and the interests of all shareholders including the minor ones within the framework of the general interests of the country; and the Board of Directors has done all in its power to achieve this end."

The record shows that Mr. Vahdati continued to participate in the decisions of the board, on one occasion submitting reports as to the selection of personnel. The last occasion on which his signature appears is a meeting held in March 1981. His resignation evidently took effect at some point between March and June 1981. But the minutes of a general meeting

held on 7 June 1981 show that two new Foremost representatives, Mr. Yahyazadeh and Mr. Sohrabi, were on that date elected to the board. They remained until their resignation in October 1981, and one of them, Mr. Yahyazadeh, participated in the preparation of the minutes of meetings in the capacity of secretary.[5]

The task now before the Tribunal is to evaluate the rights Foremost had in Pak Dairy in the period prior to the alleged expropriation; the extent to which these rights were diminished or interfered with prior to 19 January 1981; and; finally, whether such interference amounts in law to an expropriation giving rise to a right to compensation.

Such a holding would involve a determination by the Tribunal that measures were adopted which were not only detrimental in their effect on Foremost, but which went beyond the legitimate exercise by the majority of the shareholders of Pak Dairy, or by its duly elected board of directors, of their right to manage the company's affairs in what they perceived to be its best interests.

Since 1976 Foremost had been a minority shareholder with two out of seven seats on the board of directors of Pak Dairy. For a period of some seven months between November 1980 and June 1981 this representation was reduced to one, though after that, two new Foremost directors were elected. There is evidence that these directors were not mere "token" appointments, but played an active part in the company's affairs until Foremost chose to withdraw them by a telex of 23 October 1981. It is significant that to this day Foremost retains the title to its 31% shareholding. There is no record of any attempt formally to confiscate its actual shares.

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[5]Pak Dairy has argued that Foremost's continued exercise of its shareholders' rights until October 1981 gives rise to an estoppel as to the pursuit on any expropriation claim.

The only signifcant act on the part of Pak Dairy's controlling organs which appears to have been done with the object of discriminating against Foremost was the withholding of declared cash dividends for two successive years. This constituted a serious infringement of Foremost's right to enjoy the fruits of its holding in Pak Dairy. This is also the only act which can be attributed beyond doubt to the State.

The evidence, in the Tribunal's view, is finely balanced. In order to succeed before the Tribunal in a claim for expropriation, Foremost must show that it already had an outstanding claim by 19 January 1981.[6]

In the Context of the time factor in expropriation cases, the Tribunal has previously stated,

> "A claim for a taking is outstanding on the day of the taking of property. Where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property, the breach forming the cause of action is deemed to take place on the day when the interference has ripened into more or less irreversible deprivation of the property rather than on the beginning date of the events. The point at which interference ripens into a taking depends on the circumstances of the case and does not require that legal title has been transferred."[7]

As to what might be considered "more or less irreversible deprivation", it is instructive to examine the provisions of the General Terms and Conditions of the standard OPIC insurance contract, as produced by the Claimants, Article 1.13 of which

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[6]*See* note 2 above.

[7]Award No. 196-302-3 of 28 October 1985 in *International Technical Products Corporation et al.*, and *The Government of the Islamic Republic of Iran et al.* at 49.

"Expropriatory Action", as a general rule, as "any action which is taken, authorized, ratified or condoned by the Government of the Project Country, commencing during the Insurance Period, with or without compensation therefor, and which *for a period of one year* directly results in preventing: . . . b) the Investor from effectively exercising its fundamental rights with respect to the Foreign Enterprise either as shareholder or as creditor. . ." (emphasis added).

The way in which the law treats cases of alleged expropriation of foreign investment has been discussed extensively by Professor G.C. Christie, who observes:

> "The right which seems, from an examination of the cases and of the underlying realities, to be least subject to successful interference, is the right of the owner to manage his enterprise. And yet, even here one cannot be dogmatic. The fact that an alien employer is suddenly forced to take nationals of the local State on to his board of directors would not seem, by itself, to amount to expropriation. Nor would it seem to be expropriation if the alien owner were forced to take representatives of his labour force on to his board. There might even be circumstances where operating control over the enterprise might be completely taken from the alien owner without rendering the State liable even for 'damages' for use. Suppose a State took over certain foreign enterprises and operated them prudently, paying a fair return, perhaps the actual profits of the enterprise, to the owners. Presumably after a sufficient passage of time such action would amount to an expropriation, but how long this period might be one would not wish to hazard a guess. If the State announced in advance that the taking would be for

> the duration of the 'present economic emergency' but 'in no event' longer than, say, 'five years' it would seem doubtful whether an alien could complain that his property had been expropriated. Under somewhat analogous circumstances there are strong indications that, in the United States at least, such property would not be considered to have been expropriated. In such circumstances one might be tempted to ask whether the foreigner could alienate his property during the stated period and try to resolve the controversy on this ground. The editors of the Harvard Draft suggest this as a possible test. But if the enterprise were sufficiently large this criterion would add nothing because of the lack of possible buyers other than the State itself."

Christie, *What Constitutes a Taking of Property Under International Law?*, 38 Brit., Y.B. Int'l L. 307, 333-34 (1962) (footnotes omitted).

Having examined the totality of the evidence in the present Cases, the Tribunal reaches the conclusion, on balance, that the interference with the substance of Foremost's rights did not, by 19 January 1981, and still less by 27 May 1980, amount to an expropriation.

The above conclusion is not altered by consideration of the effect of the departure of Foremost's personnel from Iran. While this contributed to the diminution of the enjoyment of Foremost's rights, it did not affect their fundamental nature. In this context, it is significant that after Foremost withdrew its two directors in October 1981, Pak Dairy replied with a telex of 11 November 1981 suggesting that the resignation be withdrawn and new directors designated. It should also be noted that Foremost has not proved the existence of any statutory restrictions on its right to sell or otherwise dispose

of its shares, and the report of Standard Research Consultants does not indicate any such restrictions. The report instead concludes that "the going-concern fair market value" of Foremost's 31% interest in Pak Dairy was $11 million on 27 May 1980.

The legal characterisation of the interference suffered by Foremost appears rather to be on the same footing as that suffered by the Claimants in the *Case of Sporrong and Lönnroth*, European Court of Human Rights, Judgement of 23 September 1982, Series A no. 52.[8] There, the grant of long-term expropriation permits (twenty-three and eight years respectively), accompanied by prohibitions on construction (twenty-five and twelve years respectively), over two pieces of real property in Stockholm, resulted in a serious impairment of the enjoyment and disposition of the Claimant's property which, however, fell short of affecting the legal title. The measures were held not to be expropriatory.

The Court in *Sporrong* held:

> "In the Court's opinion, all the effects complained of . . . . stemmed from the reduction of the possibility of disposing of the properties concerned. Those effects were occasioned by limitations imposed on the right of property, which right had become precarious, and from the consequences of those limitations on the value of the premises. However, although the right in question lost some of its

[8]Cf. the case of *Ellerman v. The State of Poland*, Decision of 29 July 1924 of Mixed German-Polish Arbitral Tribunal, *Requell de décisions des Tribunaux Arbitraux Mixtes*, Vol. V, p. 457, in which the Tribunal found itself competent to render a provisional order for payment of compensation by the Polish Government to a claimant deprived of the possession and usufruct of a property in respect of which no formal instrument of expropriation had yet been issued.

> substance, it did not disappear. The effects of the measures involved are not such that they can be assimilated to a deprivation of possessions. The Court observes in this connection that the applicants could continue to utilise their possessions and that, although it became more difficult to sell properties in Stockholm affected by expropriation permits and prohibitions on construction, the possibility of selling subsisted. . . ." (paragraph 63).

It is open to the Tribunal to make a similar finding in the present Cases to the extent that the level of interferences established here constitutes "other measures affecting property rights" as contemplated by Article II, paragraph 1, of the Claim's Settlement Declaration, though it may not have risen to the level of an actual taking.

Such interference, attributable to the Iranian Government or other state organs of Iran, while not amounting to an expropriation, gives rise to a right to compensation for the loss of enjoyment of the property in question.

The Tribunal is also satisfied that Foremost's claim for expropriation must be taken to include a claim for a lesser degree of interference with its rights.

Pak Dairy was, and is, obliged to pay declared dividends to all shareholders. Faced with a clear breach of this duty in the form of the withholding by Pak Dairy of the cash dividends declared in 1979 and 1980 and due to Foremost, the Tribunal determines that an interference of the type described above exists, and that the amount of these dividends represents the correct level of compensation payable by the Government.

Foremost is therefore entitled to recover $423,758 representing the cash dividend declared in 1979 and $479,077

representing the cash dividend declared in 1980. It appears from the record that these figures are net of taxes.

The claim has been expressed by Foremost in U.S. Dollars in its pleadings before the Tribunal. No discussion has taken place, either in the written pleadings or at the hearing, concerning the accuracy of these figures. The Tribunal therefore accepts the Claimants' suggested computation in these Cases.

The dividends were declared, respectively, on 15 April 1979 and 15 April 1980. According to Article 57 of Pak Dairy's Articles of Association, dividends were to be paid "within four months after resolution of general meeting". Thus the two dividends became due, respectively, on 15 August 1979 and 15 August 1980. Foremost is entitled to interest on the first dividend from 15 August 1979, and on the second dividend from 1 October 1980, the date from which interest is claimed.

The Tribunal considers it reasonable to award interest at the rate of 10% per annum on the amounts found to be due in these Cases.

An allocation of the two dividends between the four Foremost companies in proportion to their respective holdings gives the following figures:

(a) *the dividend declared in 1979*

Foremost Tehran (10%) - $136,696.13
Foremost Shir (10%) - $136,696.13
Foremost Iran (10%) - $136,696.13
Foremost Foods (1%) - $ 13,669.61

(b) *the dividend declared in 1980*

Foremost Tehran (10%) - $154,540.97
Foremost Shir (10%) - $154,540.97
Foremost Iran (10%) - $154,540.97
Foremost Foods (1%) - $ 15,454.09

No award in respect of these dividends is made against any Respondent other than the Goverment.

Foremost's enjoyment of its shareholding was further infringed by Pak Dairy's failure to deliver the certificate representing the stock dividend declared in 1980. The certificate representing the stock dividend declared in 1979 had been collected by Mr. Fisher in person. In light of Pak Dairy's repeated assurances that Foremost's rights of ownership subsist, the Tribunal assumes that Pak Dairy will promptly deliver to Foremost the stock certificates for the stock dividend declared in 1980.

ii) *The contract claims*

Part II of Case No. 231 relates to four contracts for the lease of milk carton filling machines to Pak Dairy. Two of the lease agreements were entered into by Foremost Foods (then named International Dairy Engineering Company) and two by Foremost-McKesson. The agreements were dated 4 May 1974, 14 July 1975, 8 June 1976 and 19 November 1977, respectively. Each provided for the payment of a "base rental" in sixty consecutive monthly instalments commencing on the 10th day of the month after installation of the machine. In addition, a monthly production rental was payable, calculated in accordance with a formula based on the quantity and capacity of containers manufactured and sold, for the life of the machines. A report showing details of the number of containers filled and sold, less returns, during the preceding calendar month, together with a remittance of the amount due, was to be furnished by Pak Dairy to Foremost no later than the 10th day of the next month. Each agreement provided for a minimum production rental, and contained a clause entitling Foremost as lessor to terminate for breach and repossess the machine upon thirty days' written notice.

Foremost alleges that no monthly payments were made in respect of the machines for the period after 31 May 1979. After the filing of the claim, base rentals continued to accrue under the last of the four agreements, while production rentals continued to accrue in respect of all four machines.

On 5 November 1980, Foremost Foods and Foremost-McKesson each wrote letters to Pak Dairy giving notice of default and demanding, in accordance with the contracts, either that full payment be made or that the machines be returned within thirty days. Pak Dairy did not reply, nor did it return the machines.

Foremost has filed an affidavit of Suzan McCloskey of Ex-Cell-O Corporation, the manufacturer of the machines, who estimated the useful life of each of them as twelve years from installation, and valued the machines accordingly. Pak Dairy, on the other hand, denies that the machines would last longer than five years, though there is evidence that they continued to be used thereafter. It has disputed Foremost's evidence of valuation, and requests that an expert be appointed. It admits that five years base rental was payable in respect of the machines insofar as this was due by 19 January 1981.

Pak Dairy has not satisfied the Tribunal either by argument or evidence that the contracts were "imposed" or "one-sided". Pak Dairy's failure to pay the rental payments due or to return the machines upon demand constitutes breaches for which Foremost is entitled to compensation. First, Foremost is entitled to both base and production rental payments which were due for the use of the machines until 5 December 1980, when Pak Dairy had an obligation to return the machines. For practical purposes, the Tribunal decides that rentals are due through December 1980, and that compensation for the value of the machines (see below) was due on 1 January 1981. According to the chart produced in evidence

by Foremost and based on information received from Pak Dairy, the unpaid rentals through December 1980 amounted to $112,923.90. Foremost is also entitled to interest on the rental payments from the respective dates on which they became due. However, the Tribunal declines to award the additional rental amount of $31,807 "based on alleged production figures," as Foremost has neither adequately explained nor sufficiently substantiated this figure. Thus, Foremost Foods is entitled to recover the amount of $45,263.78 representing rental on machines QP 50886 and PPCF 3772, and Foremost-McKesson is entitled to recover the amount of $67,669.12 representing rental on machines LQP 51026 and QM 51253. In addition, the Tribunal awards Foremost Foods interest on the rental payments due it in two parts: first, the sum of $3,985.69 representing 10% interest on the unpaid rentals from the respective dates on which they were due to 10 January 1981; and second, 10% on the sum of $45,263.78, the total amount of unpaid rentals owed Foremost Foods from 10 January 1981. In the same manner, the Tribunal awards Foremost-McKesson interest on the rental payments due it in the amount, first, of $5,902.24, representing 10% interest on the unpaid rentals from the respective dates on which they were due to 10 January 1981, and second, 10% on the sum of $67,669.12, the total amount of unpaid rentals owed Foremost-McKesson, from 10 January 1981.

Second, the Tribunal considers that in the circumstances of this Case, Foremost is entitled to recover the value of the machines. Foremost's expert, an official of the company which manufactured the machines, estimated the value of the four leased machines at $331,595,00. This figure is, if anything, conservative, as the affidavit states the "current" value of the machines, presumably referring to the date of submission of the affidavit in 1983. In addition, Mr. Fisher states in his affidavit that the machines were in good working order at the

time of his departure from Iran. Even though Pak Dairy was in possession of the machines and therefore in a better position to assess their condition that Foremost, Pak Dairy had not adduced any countervailing evidence as to the value of the machines. Accepting Foremost's effectively uncontroverted evidence of valuation, the Tribunal awards $331,595.00, together with 10% interest thereon from 1 January 1981, to compensate for Pak Dairy's failure to return the machines. of the principal sum, $132,055.00 is due to Foremost Foods in respect of machines QP 50886 and RPCF 3772, and $199,540.00 is due to Foremost-McKesson in respect of machines LQP 51026 and QM 51253.

Part III of Case No. 231 is a claim in respect of the TAA entered into between Foremost-McKesson and Pak Dairy on 21 December 1970. Foremost claims a total of $157,013.70, with interest, representing various invoiced amounts and trademark licence fees. The claim is broken down into four separate items, which the Tribunal will examine in turn.

(1) *invoices for supplies, ingredients and spare machinery parts - $12,981.92*

Foremost-McKesson has provided invoices to substantiate this element of its claim, which has not been specifically disputed by Pak Dairy. It is therefore accepted in its entirety.

(b) *trademark fees for the years 1979 and 1980 at U.S.$7,500 per year — $15,000.00*

Though Pak Dairy denies that it continued to use Foremost's trademarks, the TAA, whereby a fee of $7,500 per year was payable to Foremost-McKesson for the license to do so, remained in force until 20 December 1980. The Tribunal thus finds that the fees for 1970 and 1980 are payabie.

(c) *salaries and allowances for personnel employed by Pak Dairy — $84,196.87*

Under the TAA, Pak Dairy reimbursed Foremost for services performed for it by Foremost employees. The present claim relates to three employees — Mr. Fisher, Mr. Loichinger, and Mr. Carlsson, the plant superintendent.

The invoices submitted in respect of Mr. Fisher relate mostly to periods during 1979 when he was absent from Iran, but according to the invoices, "performing Management Services for Pak Dairy". While there is no evidence as to what those services were, or what type of benefit Pak Dairy derived from them, it is not disputed that Mr. Fisher made three trips to Iran in 1979. He was still serving as managing director and on the board of directors at the time he made these trips, which totalled several months in duration. In the absence of more precise evidence, the Tribunal considers it reasonable to award salary and expenses amounting to $10,000.00, as well as airfare totalling $3,103.

The Tribunal finds that the amounts claimed in respect of Mr. Carlsson and Mr. Loichinger have not been sufficiently explained or substantiated, and they are therefore denied.

(d) *moving expenses of Mr. Fisher and Mr. Loichinger — $44,834.91*

Foremost-McKesson has submitted invoices to substantiate this element of its claim, and it has not been disputed by Pak Dairy. The Tribunal considers it reasonable to grant it.

The total amount thus payable to Foremost-McKesson under the Technical Assistance Agreement is $85,919.83. The Tribunal considers it reasonable that the Part III items should attract interest at the rate of 10% from 1 January 1981

The Award in respect to Parts II and III of Case No. 231 is based on contractual obligations for which Pak Dairy alone is liable. No award is made against any other named Respondent in respect of those claims.

d) *Costs*

Each Party shall bear its own costs.

III. *Award*

For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

1. The claim of FOREMOST TEHRAN, INC., FOREMOST SHIR, INC., FOREMOST IRAN CORP., and FOREMOST FOODS, INC., for expropriation of their respective holdings of shares in Pak Dairy is dismissed.

2. In respect of the two unpaid cash dividends, the Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN is obligated to pay:

> (a) to the Claimant FOREMOST TEHRAN, INC. the amount of Two Hundred Ninety-One Thousand Two Hundred Thirty-Seven United States Dollars and Ten Cents (U.S. $291,237.10) together with simple interest at the rate of 10 percent per annum (365-day basis) on $136,696.12 from 15 August 1979 and on $154,540.97 from 1 October 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Seucrity Account;

(b) to the Claimant FOREMOST SHIR, INC. the same amount shown in subparagraph (a) above together with the same amount of interest as shown in that subparagraph;

(c) to the Claimant FOREMOST IRAN CORP. the same amount shown in subparagraph (a) above together with the same amount of interest as shown in that subparagraph;

(d) to the Claimant FOREMOST FOODS, INC. the amount of Twenty-Nine Thousand One Hundred Twenty-Three United States Dollars and Seventy Cents (U.S. $29,123.70) together with simple interest at the rate of 10% per annum (365-day basis) on $13,669.61 from 15 August 1979 and on $15,454.09 from 1 October 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of Security Account.

3. In respect of contractual claims, the Respondent SHERKAT SAHAMI LABANIAT PASTEURIZE PAK is obligated to pay to the Claimant FOREMOST FOODS, INC. the amount of One Hundred Eighty-One Thousand Three Hundred Four United States Dollars and Forty-Seven Cents (U.S. $181,304.47) together with simple interest at the rate of 10 perent per annum (365-day basis) on $132,055.00 from 1 January 1981 and on $45,263,78 from 10 January 1981 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

4. In respect of contractual claims, the Respondent SHERKAT SAHAMI LABANIAT PASTEURIZE PAK is obligated to pay the Claimant FOREMOST-McKESSON, INC.

the amount of Three Hundred Fifty-Nine Thousand Thirty-One United States Dollars and Nineteen Cents (U.S. $359,031.19) together with simple interest at the rate of 10 percent per annum (365-day basis) on $285,459.83 from 1 January 1981 and on $67,699.12 from 10 January 1981 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

5. Each Party shall bear its own costs.

These obligations shall be satisfied by payment out of the Security Account established purusant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Dated, The Hague
10 April 1986

/s/ Gunnar Lagergren

Gunnar Lagergren
Chairman
Chamber One

In the name of God

/s/ Koorosh-Hossein Ameli	/s/ Howard M. Hotlzmann
1. Joining as to denial of expropriation claims.	1. Dissenting as to denial of expropriation claims.
2. Concurring as to granting of claims for two unpaid dividends, except dissent- as to subpararagraph 2(d) of the dispositif.	2. Joining as to granting of claims for two unpaid dividends.
3. Dissenting as to granting of contractual claims.	3. Joining as to granting of contractual claims.
4. Joining as to costs.	4. Dissenting as to denial of costs to the Claimants.
5. Dissenting as to award of interest.	5. Joining as to award of only 10% interest solely in order to form a majority. See my Separate Opinion in *International Schools Services, Inc.* and *National Iranian Copper Industries Company*, Award No. 194-111-1, pp. 3-4 (10 October 1985).
6. Dissenting as to the existence of jurisdiction over certain of the claims and Parties. The majority having concluded that such jurisdiction exists, I have in some instances participated and voted on the merits.	
See separate opinion.	See separate opinion.

IRAN UNITED STATES
CLAIMS TRIBUNAL
FILED 15 APR 1986

RECEIVED
16 APR 1986
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U.S. AGENT

IRAN-UNITED STATES CLAIMS TRIBUNAL

CASE NOS. 37 and 231
CHAMBER ONE
AWARD NO. 220-37/231-1

Case No. 37

FOREMOST TEHRAN, INC., FOREMOST SHIR, INC., FOREMOST IRAN CORP., FOREMOST FOODS, INC., FOREMOST-McKESSON, INC., OVERSEAS PRIVATE INVESTMENT CORPORATION,

Claimants,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, THE MINISTRY OF ECONOMIC AFFAIRS AND FINANCE, FINANCIAL ORGANISATION FOR THE EXPANSION OF OWNERSHIP OF INDUSTRIAL UNITS, NATIONAL INVESTMENT COMPANY OF IRAN INDUSTRIES AND MINES BANK, FOUNDATION FOR THE OPPRESSED, SHERKAT SAHAMI LABANIAT PASTEURIZE PAK,

Respondents.

Case No. 231

FOREMOST TEHRAN, INC., FOREMOST SHIR, INC., FOREMOST IRAN CORP., FOREMOST FOODS, INC., FOREMOST-McKESSON, INC.,

Claimants,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, THE MINISTRY OF ECONOMIC AFFAIRS AND FINANCE, FINANCIAL ORGANIZATION FOR THE EXPANSION OF OWNERSHIP OF INDUSTRIAL UNITS, NATIONAL INVESTMENT COMPANY OF IRAN INDUSTRIES AND MINES BANK, FOUNDATION FOR THE OPPRESSED, BANK MARKAZI IRAN, SHERKAT SAHAMI LABANIAT PASTEURIZE PAK,

Respondents.

DISSENTING OPINION OF JUDGE HOLTZMANN ON EXPROPRIATION

The Award in these Cases includes a number of significant holdings in which I join. For example, it concludes that a claimant is not barred from coming before this Tribunal because it has received payment under a contract insuring it against the risk of expropriation and has assigned a beneficial interest in its claim to the insurance company. Further, finding various breaches of contract, the Award establishes methods for computing damages and interest upon failure to pay rentals and to return leased machinery. Importantly, the Award holds the Government of the Islamic Republic of Iran responsible for measures taken by a private company because its affairs were dominated by directors who were representatives of governmental entities and government-owned banks that owned a majority of its stock. In consequence, the Award holds that the Government of Iran must fully compensate Foremost[1] for Pak Dairy's[2] refusal to pay Foremost divdends declared in 1979

[1]As used herein, "Foremost" refers collectively to Foremost-McKesson, Inc. and various of its subsidiaries.

[2]Sherkat Sahami Labaniat Pasteurise Pak, herein called "Pak Dairy" or "Pak."

and 1980 and paid to other shareholders. In reaching these conclusions, the Tribunal accurately chronicles that takeover of Pak by Government representatives and the discriminatory treatment of Foremost that ensued.

The Tribunal errs, however, by failing to recognize that Pak's actions, continuing and uncorrected, so deprived Foremost of its rights as a holder of 31% of Pak's stock as to have constituted an expropriation of those rights and created an obligation to compensate Foremost not only for two unpaid dividends but also for the value of its shares. In this way, the Tribunal ignores the full consequences of the events it describes.

The Award acknowledges, as it must to remain faithful to the unquestioned view of both this Tribunal and international law authorities in general, that the absence of a formal expropriation decree or legislative act presents no bar to Foremost's claim here:

> [M]easures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the proprety formally remains with the original owner.

Starrett Housing Corp. and *Islamic Republic of Iran*, Award No. ITL 32-24-1 (19 December 1983), *reprinted in* 4 Iran-U.S. C.T.R. 122, 154.[3] It is equally well settled that "(a) depriva-

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[3]*See Harza Engineering Co.* and *Islamic Republic of Iran*, Award No. 19-98-2 (3 December 1982), *reprinted in* 1 Iran-U.S. C.T.R. 499, 504; *Dames and Moore* and *Islamic Republic of Iran*, Award No. 97-54-3 (20 December 1983), *reprinted* in 4 Iran-U.S. C.T.R. 212, 223; Christie, *What Constitutes a Taking of Property Under International Law?*, 1963 Brit. Y.B. Int'l L. 307, 311.

tion or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits . . . ." *Tippetts, Abbott, McCarthy, Stratton* and *TAMS-AFFA Consulting Engineers of Iran*, Award No. 141-7-2, pp. 10-11 (29 June 1984).[4]

There can hardly be a greater interference with the use and enjoyment of a shareholder's rights than for a corporation to refuse repeatedly to pay dividends to that shareholder while it makes such payments to all others. That is exactly what happened to Foremost. Pak Dairy's Articles of Association require that at least 10% of its annual profits be distributed to the shareholders in the form of dividends. Pak earned profits in 1978 and, accordingly, a cash dividend and a stock dividend were declared at a board meeting in April 1979. Foremost did not receive its cash dividend, although all other shareholders were paid theirs. Pak Dairy again earned profits in 1979, and a cash and a stock dividend were declared at a meeting in March 1980. Again the cash and stock dividends were distributed to the Iranian shareholders, while Foremost received neither.

The minutes of the meeting of the board of directors at which the later dividends were declared frankly describe the decision not to pay Foremost. The meeting was dominated by the charman of the board, Dr. Mohsen Ameli, who was also chairman of the Financial Organization for the Expansion of Ownership of Industrial Units, a governmental agency that was a major shareholder in Pak. The corporate minutes record that

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[4]*See* Draft Convention on the International Responsibility of States for Injuries to Aliens, Art. 10(3)(a) ("Taking of property" occurs when there is "unreasonable interference with the use, enjoyment, or disposal of property"), *reprinted in* Sohn and Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 Am. J. Int'l L. 545, 553 (1961).

Dr. Ameli and another director representing the Financial Organization initially "expressed their opinion that the minimum dividend should be divided among the shareholders." The minutes explain that "[t]heir reason for this action was the presence of foreign shareholders in the company," and tht "[b]y this action, they wanted to hold the amount paid to the foreigners to the minimum." Foremost was the only significant foreign owner.

The minutes also describe the "extensive discussion" that followed. The directors acknowledge that "[t]he profits made by the company under current laws and regulations belong to the company, and the shareholders have a right thereto in proportion to their capital investment . . . ." Accordingly, the board decided that "[i]n order to preserve the rights of the Iranian shareholders, it seems essential that a reasonable percentage of the company's profits be divided in the form of a cash or a stock dividend . . . ." The board was faced, however with a dilemma — how might it distribute profits in the form of dividends without paying Foremost? It devised a simple solution. Asserting that "due to the existing dispute between the governments of Iran and the United States, the payment of profits to the foreign shareholders has been suspended for the time being," the board concluded that "[c]onsequently a decision . . . in this regard will have no effect on the rights of the foreign shareholders or the enforcement thereof." The board cited no law or regulation imposing such a suspension, and there is no indication that any existed. Having determined not to pay Foremost, the board thereupon voted in favor of a cash dividend equal to 18% of the prior year's profit and a 10% stock dividend.

Foremost vigorously sought its dividends. By telex and confirming letter dated 2 May 1980, Foremost made a "request and demand" that its cash dividends "be immediately

deposited" to its account in either Bank of Tehran or Bank Melli, both located in Tehran. Foremost noted that any difficulty in transferring the dividends to it in United States dollars would provide "[n]o justification for Pak to continue to hold these funds it its own name." Therefore, it "insist[ed] that these funds be separated from the funds of Pak Dairy and placed in a bank account under the exclusive control of Foremost-McKesson, Inc." Pak Dairy's answer came swiftly. In a telex of 27 May 1980, the then managing director of Pak said flatly, "I have to inform you that due to decision and instruction of the board of directors, Pak Dairy cannot pay any sums of money for any reason to foreign shareholders." Unwilling to accept this rebuff from Pak's managing director, Foremost sent another telex on 5 June 1980, requesting,

> that the board of directors communicate to us directly their decision in this matter and express to us the legal basis for this denial. We are not aware of any Iranian regulation or decree which permits the unequal treatment of the shareholders of an Iranian company.

There was no reply.

On 28 September 1981, fifteen months after the first refusal to pay dividends and eight months after the Algiers Accords had been signed, Pak Dairy's board of directors sent a telex to Foremost in connection with arranging a proposed settlement meeting. In that telex, Pak stated for the first time that the dividends had been credited on Pak's books to Foremost's account. Pak's Articles of Association contain no provision authorizing the company to credit dividends to a shareholder's account on the company's books instead of paying them, nor have the Respondents cited any Iranian law authorizing such action.

As the Tribunal correctly concludes, the denial to Foremost of its shares of the company's profits "appears to have been done with the object of discriminating against Foremost," and this treatment constituted a "serious infringement of Foremost's right to enjoy the fruits of its holding in Pak Dairy." Moreover, as the Tribunal also correctly concludes, this action "can be attributed beyond doubt to the State." These circumstances are classic hallmarks of expropriation. Foremost retains the physical possession of its share certificates in Pak Dairy, but it is an owner in name only.[5] Its shares have become mere pieces of paper, of interest only to scripophilists — the hobbyists who collect financially worthless share certificates for their historical or decorative value.

Subsequent events confirm that Foremost's shares were expropriated no later than 27 May 1980, when Mr. Asghari advised Foremost of the board decision to deny it any share in Pak's profits. The dividends declared in 1979 and 1980 still have not been paid to Foremost, or even deposited in an Iranian bank account in its name. Moreover, it is uncontested that a dividend was declared in 1981 based on profits earned in 1980, and that Foremost did not receive this dividend. In addition, Foremost has received no dividends since, although there is good reason to believe that they have been declared. In a telex to Foremost dated 11 November 1981, Pak Dairy informed Foremost that the "company ha[d] in no way been in a worse condition in the two or three recent fiscal periods" than during the period when Foremost had participated in management. If this is true — and there is no evidence to the

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[5] *See The Measures Taken by the Indonesian Government Against Netherlands Enterprises*, 5 Neth. Int'l L. Rev. 227, 236 (1958) (When there is a "refusal in advance to grant permission for the transmission of operating profits to the owners, the latter have been deprived of all enjoyment of their property [and] remain the owners in name only.").

contrary — Pak Dairy presumably has continued to earn profits, giving rise, pursuant to its Articles of Association, to an obligation to distribute a percentage of those profits as dividends. Foremost has received no dividends, a circumstance consistent only with a finding that an expropriation has occurred. Nor is there any reason to believe that Foremost will ever receive its share of Pak's past or future profits. Rather, "subsequent events and the passage of time have made . . . unavoidable" the conclusion that the Respondents' actions have "rendered [Foremost's] rights of ownership to meaningless as to be the equivalent of an expropriation of those rights." Concuring Opinion of George H. Aldrich, *ITT Industries Inc.* and *Islamic Republic of Iran*, Award No. 47-156-2 (26 May 1983), *reprinted in* 2 Iran-U.S. C.T.R. 349, 352[6] Clearly, "this deprivation is not merely ephemeral." *Tippetts, Abbott, McCarthy, Stratton, supra*, p.11.[7]

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[6]*See Phelps Dodge Corp.* and *Islamic Republic of Iran*, Award No. 217-99-2 (19 March 1986) (events in five years after 19 January 1981 relied upon as evidence to confirm expropriatory action before that date and to support conclusion that deprivation was "likely to continue indefinitely").

[7]Again in this Award, the Tribunal gives effect to the teaching of *Phelps Dodge, supra*, and the *ITT Industries* concurrence, *supra*, that events occurring after 19 January 1981 cast light on events which a Clamiant asserts have given rise to a claim before that date, the deadline by which a claim must have been "outstanding" in order to fall within this Tribunal's jurisdiction. Claims Settlement Declaration, Article II, paragraph 1. Indeed, the Tribunal's holding that no expropriation occurred relies almost entirely on Foremost's participation until October 1981 on the Pak Dairy board of directors, and the Tribunal finds it "significant that after Foremost withdrew its two directors in October 1981, Pak Dairy replied with a telex of 11 November 1981 suggesting that the resignation be withdrawn and new directors designated." Moreover, the the Tribunal discusses changes in the composition of Pak Dairy's Board of Directors which occurred earlier, in June 1981. Inexplicably, however, the Tribunal declines to consider what the continuing refusal of Pak Dairy to pay Foremost its rightful dividends has to say about the situation that existed before 19 January 1981, by which time the decision not to pay Foremost had been made.

While the bare refusal to permit Foremost to share in Pak Dairy's profits suffices to establish expropriation, the circumstances leading to and surrounding the refusal provide colorful insights into the state of affairs. For example, shortly aftertaking a place on the board, Dr. Ameli observed that the Financial Organization did not "regard the Pak Pasteurized Company as really being a [private] company." An affidavit before the Tribunal recounts how Dr. Ameli walked out of a discussion of Foremost's representation on Pak's board of directors, declaring that he would not stay at a meeting with "American sympathizers." Later, at Dr. Ameli's instigation, Foremost's managing director was ousted from the board, and its remaining representative was prevented from using proxies to vote for a replacement on the pretext that the proxies were technically defective, even though proxies in the same form had been accepted at earlier meetings. The board minutes record that even one of the directors representing an Iranian bank protested against questions being "dictatorially solved" in accordance with Dr. Ameli's views. That director was replaced a few months later. The denial of any financial benefits to Foremost extended to amounts due under its machine rental and technical assistance agreements with Pak. Referring to those contracts, Dr. Ameli declared in handwriting on the minutes of a November 1979 board meeting:

> As stated in previous meetings, all foreign contracts of the company must be reconsidered, and are not valid in my opinion, as any payment in this connection shall be illegal.

The other director representing the Financial Organization penned his concurrence on the same minutes, stating "I agree with the view of Dr. Ameli and that actions should be taken accordingly." Neither Dr. Ameli nor his colleague cited any law that would render "illegal" Pak's honoring of its contrac-

tual obligations — as, indeed, no legal authority has ever been cited for the refusal to pay dividends to Foremost. Taken together, these cirumstances reveal a systematic and blatant pattern of conduct by Pak's directors to deny Foremost all financial benefits from it relationships with Pak.

Further confirmation of the occurrence of an expropriation here is provided by OPIC's determination, under an insurance contract whose relevant terms[8] are consistent with the definition of expropriation under customary international law, to pay Foremost compensation not only for the insured portions of the unpaid dividends, but also for the insured portion of its share in the value of Pak Dairy as a whole. The action of Foremost's insurer does not, of course, bind this Tribunal. It is nonetheless instructive that an experienced insurance company, evaluating the same actions as this Tribunal, concluded, against its own financial interest, that there had been an expropriation. The credibility of that determinaton is

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[8]The contract provides in pertinent part:

> 1.13 *Expropriatory Action*. The term "Expropriatory Action" means any action which is taken, authorized, ratified or condoned by the Government of the Project Country, commencing during the Insurance Period, with or without compensation therefor, and which for a period of one year directly results in preventing:
>
> > (a) the Investor from receiving payment when due in the currency specified of amounts which the Foreign Enterprise owes the Investor on or in respect of the Securities; or
> >
> > . . .
> >
> > (e) the Investor from repatriating, and from exercising effective control in the Project Country over, amounts received in respect of the Securities as Investment Earnings or Return of Capital, which action commences within the eighteen (18)months immediately succeeding such receipt . . . .

Overseas Private Investment Corporation, General Terms and Conditions of Contract of Insurance.

bolstered by OPIC's willingness to deny claims when it considered that no expropriation had occurred. *See Revere Copper & Brass, Inc. v. Opic*, 628 F.2d 81 (D.C. Cir.), *cert. denied*, 446 U.S. 839 (1980); *OPIC v. Anaconda Co.*, 418 F. Supp. 107 (D.D.C. 1976).[9]

To reach the contrary conclusion that there was no expropriation, the Tribunal conducts a "balanc[ing]." On the one hand, it states unequivocally that "Pak Dairy was, and is, obliged to pay declared dividends to all its shareholders," and it finds no justification for the refusal to pay them to Foremost. On the other, however, it reasons that this "undoubted interference with Foremost's rights [cannot] be interpreted as amounting to an expropriation of Foremost's interests

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[9]In connection with the jurisdictional requirement that claims before this Tribunal have been "outstanding" by 19 January 1981, the Tribunal finds it "instructive" that the General Terms and Conditions of the standard OPIC insurance contract include a requirement that allegedly expropriatory action prevent the exercise of ownership rights "for a period of one year." *See* note 8, *supra*. The Tribunal misconstrues this provision. The insurance contract provides that the insurance company will pay for expropriations occurring within the policy period, but will wait for one year to be sure that the expropriation was not transitory. Thus, events that occur after the expropriation are taken into account to determine whether the expropriation was rescinded. The one year waiting period does not mean that the expropriation is deemed to have occurred one year after its initial manifestation; it reflects simply a prudent practice to test whether an expropriation has taken place in the light of events following it. In any event, here the expropriation arises from Pak Dairy's refusal to pay Foremost its dividends. The first was due, as the Tribunal finds, on 15 August 1979. Thus, taken as a whole, the events in these Cases establish an expropriation satisfying the one-year requirement before the jurisdictional deadline of 19 January 1981.

when set against the background of Foremost's continued, albeit circumscribed, participation in the affairs of the company."[10]

The weight the Tribunal accords to Foremost's "continued, albeit circumscribed, participation" on Pak's board produces a curious "balance." At all times relevant to these cases, Foremost was a minority shareholder. The events here recounted amply illustrate that, as such, it did not have the power to direct the affairs of the company. A minority shareholder participates on the board in order to express its views and to observe the company's performance from an informed vantage point. Its participation, therefore, is but a means to its principal objective — a proportionate share in the profits and growth of the enterprise. And the right to participate is meaningless where, as here, the entitlement to share in profits is denied.[11]

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[10]Even on its own terms, however, the Tribunal does not fully compensate Foremost. Holding that Foremost's claim of expropriation encompasses the claim of unlawful interference on which it bases its decision, the Tribunal awards the value of the cash dividends withheld from Foremost in 1979 and 1980. But as to the 1980 stock dividend, the Tribunal merely "assumes" that Pak Dairy will deliver to Foremost the stock certificates to which it is entitled. The same principles which lead the Tribunal to hold that Foremost was wrongfully deprived of its cash dividend apply equally to the stock dividend, and there is no reason why the Tribunal should not order effective relief in this regard.

[11]For these reasons, it is hard to understand the Tribunal's reliance on Christie, *What Constitutes a Taking of Property Under International Law?*, 38 Brit. Y.B. Int'l L. 307, 333-34 (1962). The Tribunal recites a long passage from Professor Christie's article, but does not explain its application to these cases. The passage is plainly irrelevant. It deals entirely with the "right of the owner to manage his enterprise." As a minority shareholder, Foremost had no such right. And the explicit assumption of the passage the Tribunal quotes is that the State continues to pay the owner a fair return, a circumstance indisputably absent here.

The Tribunal, however, erroneously assumes that Foremost's participation on the Pak Dairy Board of Directors, in what proved a futile attempt to protect its interests, is somehow inconsistent with the claim of expropriation. To the contrary, Foremost acted in the exercise of reasonable business judgment. After revolutionary events forced all expatriate executives to leave Iran, Foremost participated in Pak's management only by exercising its right to elect two of the seven members of Pak Dairy's board of directors, as it was entitled by the cumulative voting provisions of Iranian law. As conditions in Iran prevented Foremost from sending United States nationals to attend Pak Dairy board meetings, it designated various Iranian individuals to serve from time to time as its representatives on the board. Even though generally ineffective, this presence at board meetings was the best means Foremost had to keep contact with a company in which it had made a substantial investment and in which it hoped that its ownership rights might one day be restored.[12]

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[12]Foremost described its motivation in an October 1981 telex to the Pak board:

> Since the expropriation, notwithstanding Pak's arbitrary refusal to grant Foremost its most fundamental rights with regard to Pak (which refusal forms the basis of the expropriation) and even though Foremost was prevented by the Government of Iran from obtaining its lawful share of the profits of the company, Foremost felt it had no other recourse than to continue to attempt to influence the management and operation of Pak by attendance at meetings of shareholders and of the board of Directors of Pak. This was done in the hope Forement's continued physical presence at company meetings might have the effect of deterring the inexperienced Government directors from wasting the company's assets . . . .

Having finally concluded that the presence of its representatives at meetings was a "futility," Foremost informed Pak by this telex that it "no longer sees a reason to continue its presence at board of directors and shareholder meetings of Pak." Accordingly, Foremost's two representatives on the board resigned.

Indeed, the Tribunal's reliance on Foremost's continued participation could discourage minority shareholders which find themselves in a similar situation from pursuing the course of action which would serve the best interests of the putatively expropriated company. The record makes clear that Foremost permitted its representatives on the board to serve as long as they did in the hope of preserving the value of the company and thereby mitigating the effects of the expropriation. To the extent that they succeeded, of course, the benefit would inure to all parties.

It is also curious that the Tribunal finds it significant that "to this day Foremost retains the title to its 31% shareholding," that "[t]here is no record of any attempt formally to confiscate its actual shares," and that "Foremost has not proved the existence of any statutory restriction on its right to sell or otherwise disposes of its shares." As *Starett, supra*, teaches, and as the Tribunal reiterates in this Award, the absence of formal measures is irrelevant to a claim of expropriation in circumstances such as those here.

Finally, the Tribunal gains no support from the *Case of Sporrong and Lönnroth*, European Court of Human Rights, decision of 24 September, 1981, Series A, no. 32. First, *Sporrong* was brought by Swedish citizens against their own government, and the distinguished European Court of Human Rights has expressly stated that its decisions concerning takings by a State of the property of its own nationals are not governed by general principles of international law. *See Case of James and Others*, European Court of Human Rights, judgment of 21 February 1986, Series A, Vol. 98, paras. 58-60. More importantly, the interference with property rights proven in *Sporrong* was of a fundamentally different character than that at issue here. There, as the passage quoted by the Tribunal indicates, "*all* the effects complained of . . .

stemmed from the reduction of the possibility of disposing of the properties concerned." *Id.*, para. 63 (emphasis added). Notwithstanding the State-imposed restructions on real property in *Sporrong*, the owners "could continue to utilize their possessions," and "the possibility of selling [them] subsisted." *Id.* Here, in contrast, the impairment or elimination of Foremost's ability to sell its shares[13] is only one aspect of the State interference with its property rights. Unlike the applicants in *Sporrong*, Foremost has additionally, and crucially, lost the "use" of its property in the only sense meaningful in this context — the right of a minority shareholder to share in the profits of the enterprise.

It is settled in this Tribunal, as a matter both of customary international law and of the Treaty of Amity between the United States and Iran,[14] that an owner is entitled to compensation for the full value of expropriated property. *See American International Grop Inc.* and *Islamic Republic of Iran*, Award

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[13]Surely no foreign buyer would purchase Foremost's shares after Pak Dairy announced that it would not "pay any sums of money for any reason to foreign shareholders," and then refused even to explain that decision let alone rescind it. Nor is it reasonable to expect that there would be an Iranian buyer for Foremost's shares. In view of current circumstances and governmental policies, the most likely Iranian buyer would be a governmental entity. Having eliminated Foremost without paying it, however, the Government has no need to purchase Foremost's shares. While Pak's shares had been traded in small amounts on the Tehran Stock Exchange, it appears that that market ceased to operate after the Islamic Revolution. Even were it available, record evidence shows that it could not have absorbed a large block of shares at a fair price. Iranian individuals, who could receive governmental assistance by purchasing Pak shares from the Financial Organization for the Expansion of Ownership of Industrial Units, would hardly choose to purchase instead from Foremost. Thus, for all practical purposes, after May 1980 Foremost was unable to sell its shares.

[14]Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, *signed* 15 August 1955, *entered into force* 16 June 1957, 284 U.N.T.S. 93, T.I.A.S. No. 3853, 8 U.S.T. 899.

No. 93-2-3 (19 December 1983) (customary international law), *reprinted in* 4 Iran-U.S. C.T.R. 96, 105-09; *Phelps Dodge Corp.* and *Islamic Republic of Iran*, Award No. 217-99-2, pp. 14-18 (19 March 1986) (Treaty of Amity); *Sedco, Inc.* and *National Iranian Oil Co.*, Award No. ITL 59-123-3, pp. 6-7, 13 (27 March 1986) (Treaty of Amity). Normally, a business enterprise is valued as a going concern at the date of expropriation, taking into account its future profitability. *See American International, supra. See also Sedco, supra.* Applying those principles to this case, Foremost is entitled to receive compensation equal to 31% of the going concern value of Pak Dairy in May 1980. For the purposes of this opinion, it is unnecessary precisely to calculate that amount. Foremost has offered in evidence a report of a valuation expert which concluded that the going concern value of the 31% holding in Pak on 27 May 1980 was $11 million. Foremost also points out that in 1975 the Financial Organization purchased a large block of Pak shares from Foremost as part of a program for broadening public ownership in companies such as Pak. Applying the valuation formula established by the Central Bank of Iran in that prior transaction, it appears that the value of Pak in May 1980 was approximately $10 million. Accordingly, I would have awarded compensation of at least $10 million, plus 11.5% interest from the date of expropriation, and Foremost's costs of this arbitration.

In sum, the Tribunal here acknowledges only the tip of the iceberg; it ignores the greater mass that lies beneath. For that reason, I respectfully dissent.

/s/ Howard M. Holtzmann
Howard M. Holtzmann
The Hague

The Hague
14 April 1986

APPENDIX H

IRAN

Guaranty of Private Investments

Agreement effected by exchange of notes
Signed at Tehran September 17 and 21, 1957;
Entered into force September 24, 1957.

The American Ambassador to the Iranian Minister for Foreign Affairs

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

No. 1235 Tehran, *September 17, 1957*

Excellency:

I have the honor to refer to conversations with have recently taken place between the representatives of the two Governments relating to guaranties authorized by Section 413(B)(4) of the Mutual Security Act of 1954 and to confirm the following understandings reached as a result of these conversations:

1. The Governments of Iran and the United States of America shall, upon the request of either party, consult on related projects proposed by nationals of the United States of America with regard to which guaranties have been made or are being considered under Section 413(b)(4) of the Mutual Security Act of 1954.

2, The Government of the United States of America agrees not to guarantee any project unless it is approved by the Government of Iran.

3. With respect to such guaranties which may be extended to projects which are approved by the Government of Iran in accordance with the purport of the aforesaid Section 413(b)(4), the Government of Iran agrees:

a. That if the Government of the United States of America makes payment in United States dollars to any person under such guaranty, the Government of Iran shall recognize the transfer to the United States of America of any right, title or interest of such person in assets, currency, credits, or other property on account of which such payment was made, and also the subrogation of the United States of America to any claim or cause of action and/or right of such person arising from this transfer.

b. That such rial amounts as may be acquired by the American Government by virtue of such guaranties shall be accorded treatment not less favorable than that accorded private funds obtained through transactions by American nationals which are comparable to transactions covered by such guaranties, and that such rial amounts shall be made freely available to the Government of the United States of America for administrative expenditures.

c. That any claim against the government of Iran to which the Government of the United States of America may be subrogated as a result of any payment under such guaranty shall be the subject of direct negotiation between the two Governments. If within a reasonable period of time the two Governments are unable to settle the dispute by mutual agreement, the matter shall be referred for final and binding determination to a sole arbitrator to be selected by mutual agreement. If the two Govern-

ments are unable, within three months, to reach an agreement on the selection of arbitrator, the arbitrator shall be such person as may be designated by the President of the International Court of Justice at the request of either Government.

Upon receipt of a note from Your Excellency indicating that the foregoing provisions are acceptable to the Government of Iran, the Government of the United States of America shall consider this note and Your Excellency's reply thereto as constituting an agreement between the two Governments on this subject.

This Agreement shall be put into effect [1] as of the date of the receipt of Your Excellency's note in reply.

Accept, Excellency, the renewed assurances of my highest consideration.

SELDEN CHAPIN

His Excellency
ALI QOLI ARDALAN,
Minister for Foreign Affairs,
Tehran.

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[1]Sept. 21, 1957.